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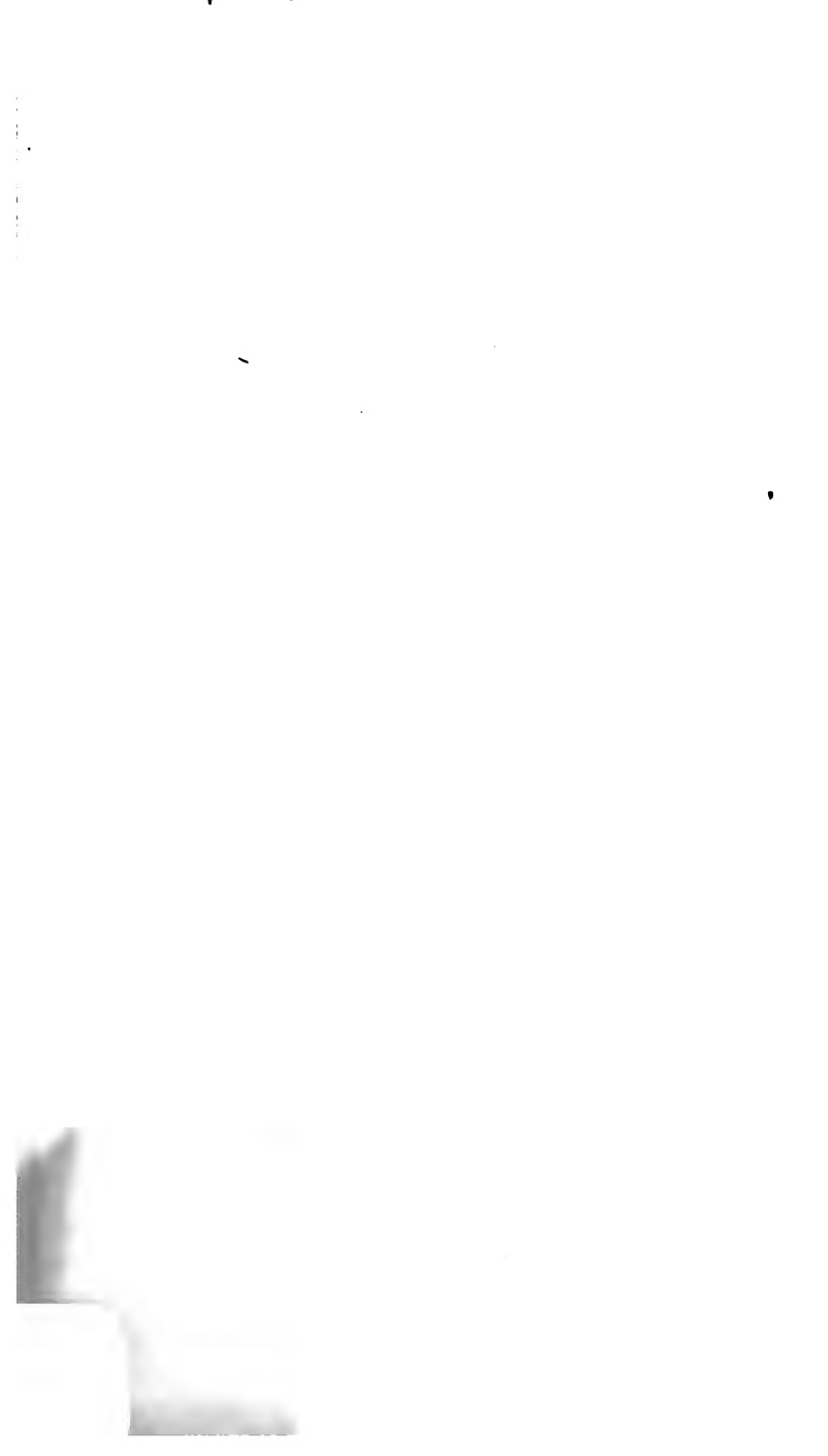
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R E P O R T S

OF

CASES

James P. Smith
ARGUED AND DETERMINED

IN

The Court of King's Bench.

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,
AND
EDWARD HALL ALDERSON, OF THE INNER TEMPLE, ESQRS.
BARRISTERS AT LAW.

V O L. V.

Containing the Cases of MICHAELMAS, HILARY, EASTER, and
TRINITY Terms, in the 2d and 3d of GEO. IV. 1821, 1822.

L O N D O N :

PRINTED BY A. STRAHAN,

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AND J. COOKE, OBDOND-QUAY, DUBLIN.

1822.

During the Period of these REPORTS.

ST. JOHN BAPTIST CHURCH
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ST. JOHN BAPTIST CHURCH

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COLLECTOR-GENERAL.

Sir John Hutchinson Colley.

J U D G E S
OF THE
COURT OF KING'S BENCH,
During the Period of these REPORTS.

SIR CHARLES ABBOTT, Knt. C. J.
SIR JOHN BAYLEY, Knt.
SIR GEORGE SOWLEY HOLROYD, Knt.
SIR WILLIAM DRAPER BEST, Knt.

ATTORNEY-GENERAL.

SIR ROBERT GIFFORD.

SOLICITOR-GENERAL.

SIR JOHN SINGLETON COPLEY.

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ERRATA.

Page 3. n. (c) for "10 East, 330," read "10 East, 130."

56. l. 15. "not entitled to recover," dele "not."

167. l. 14. for "obligees," read "obligors."

198. n. (a) l. 4. for "indorsement or certificate," read "on the certificate."

261. marginal note, l. 8. for "obligee," read "obligor."

373. n. (c) for "443." read "473."

444. marginal note, l. 29. for "13 Geo. 3." read "17 Geo. 3."

460. l. 1. for "19," read "15."

538. marginal note, l. 12. for "28 Geo. 2." read "22 Geo. 2."

561. l. 5. for "by," read "to," and same in marginal note line 3., and note, that
Golding Ray was a trustee, and see 5 Mod. 310. same case.

565. n. (a) for "658." read "632."

627. n. (a) for "1 Townt." read "6 Townt."

633. n. (a) for "6 Townt. 425" read "6 Townt. 428."

634. l. 12. for "against the defendant," read "against the plaintiff."

687. marginal note, l. 7. dele "not."

712. ——— l. 12. for "obligor," read "obligee."

——— l. 21. for "obligee," read "obligor."

——— l. 32. for "obligee," read "obligor."

793. n. (a) for "1 Salt. 29." read "1 Salt. 294."

C A S E S

ARGUED AND DETERMINED

1821.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Second Year of the Reign of GEORGE IV.

VERNON *against* SMITH.

Saturday, (a)
October 20th.

COVENANT by the assignee of the lessor against the lessee. The declaration stated, that one *J. Hance*, the lessor, before the time of making the lease, was lawfully possessed of the tenements and premises for the residue and remainder of a certain term of years, whereof seven years were then unexpired; which tenements and premises, with the appurtenances, then were and thence hitherto have been and still are situate within the weekly bills of mortality, mentioned in the 14 G. 3. c. 78.; and being so possessed thereof, he, the said *J. Hance*, by indenture, demised and leased to the defendant the tenements

A covenant to insure against fire premises situated within the weekly bills of mortality mentioned in 14 G. 3. c. 78., is a covenant that runs with the land.

(a) See 4 B. & A. 345.

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VERNON
against
SMITH.

ments and premises, with the appurtenances, *habendum* for seven years, at a certain rent therein mentioned covenant by the defendant that he should and would forthwith, at his own expence, and from time to time during the term, insure in some of the public offices in *London* or *Westminster*, for the purpose of insuring houses from casualties by fire, the messuage, dwelling house, coach-house, stable, and premises thereby demised or thereafter to be erected and built thereon, to the amount of 800*l.*, in the joint names of the defendant his executors, administrators, or assigns, and of *Robert Stone*, the ground landlord of the premises, his heirs or assigns; and should and would, at the request of *Hance*, or of the ground landlord, their heirs or assigns, produce the policy and receipts for such insurance. The declaration set out the proviso in the lease for re-entry, on breach of any of the covenants. It then stated the Defendant's entry into the premises, and that, after the making of the indenture, the term was assigned by *Hance* to the plaintiff. The breach assigned was, that the defendant did not insure. The second count stated, that, before the making of the demise to the defendant, in the first count mentioned, and also before and at the time of the making of the demise thereafter mentioned, *Robert Stone* was seised in fee of and in the said demised tenements, and by a certain indenture, demised the same to *J. Hance*, *habendum*, for 85 years and six months. And that *J. Hance*, by that indenture, covenanted to insure the premises from fire, to the amount of three-fourths of the value thereof, in the joint names of himself and *Stone*, with a proviso for re-entry, in case of non-performance of the covenants. It then stated, that three-fourths of the value of the pre-
mises

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 Vexatious
 against
 State.

mises amounted to 800*L.*, and that, by reason of the said demised premises remaining uninsured, *Stone* brought an action of ejectment for the forfeiture, and the plaintiff was forced to pay the costs to him, amounting to 500*L.*, and also to sustain his own costs, amounting to 1000*L.* Breach, that the defendant had not kept the covenant made by him, as stated in the first count. To this declaration, there was a general demurrer and joinder.

Comyn, in support of the demurrer. The assignee of the lessor cannot maintain this action, because the covenant to insure against casualties by fire is a mere personal covenant. Covenants which run with the land must be such as affect the land itself, and not the collateral interest of the lessor. The rule upon this subject is accurately laid down in *Spencer's* case (a), *Bally v. Wells* (b), and *The Mayor of Congleton v. Pattison*. (c) In *Spencer's* case it is expressly stated, that a covenant to pay a collateral sum to the lessor or a stranger, shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing demised. By the covenant to insure, the lessee agrees to pay an annual sum to a stranger, in consideration of which that stranger is to pay to the lessee a certain stipulated sum, in case the premises should be injured by fire. There is not any stipulation that that sum, when recovered, shall be laid out upon the land, and the tenant may therefore apply it to any other purpose. The covenant does not, therefore, in any respect affect the nature, quality, or value of the thing demised, independently of collateral circumstances, and therefore is not a covenant which passes to the assignee. Secondly,

(a) 5 *Coke*, 17.(b) *Wilmet's Notes*, 544.(c) 10 *East*, §30.

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 against
 SMITH.

the nature of the covenant cannot be altered by the provisions of the 14 Geo. 3. c. 78. s. 83., which appl. only to the case where an insurance has actually been made, and does not go to regulate the covenants between lessor and lessee. No insurance having been made in this case, it does not fall within the statute. Thirdly, the statute only enables the directors of the company, upon the request of the persons interested in the houses damaged by fire, or upon any ground of suspicion that the persons insured had been guilty of fraud, or of wilfully setting their houses on fire, to cause the insurance money to be expended in rebuilding the premises. Now as it appears, from the preamble of the clause, that the object was to prevent fraudulent insurances, the power of the directors so to apply the money ought to be restrained to such cases only. Nor does it apply to a case where the money has been disposed of among the contending parties previously to the application of the parties interested. The statute, therefore, is not absolutely directory that the money recovered shall at all events be laid out on the premises, and, consequently, it does not alter the situation of the defendant in this case.

Chitty, contra. The lessee having covenanted to cause the insurance to be effected in the joint names of the ground landlord and himself, could not, in the event of his having effected such an insurance, and a loss having afterwards occurred, have received the money without the consent of such landlord, and a court of equity would have directed the money to be laid out in rebuilding or repairing the premises. The interest of the landlord is materially varied by the circumstance of the lessee

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 against
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lessee being bound to insure: for the rent reserved is decreased, in proportion to the amount of the annual premium paid, and the assignee of the lessor would take the premises at an increased rent, unless the lessee had covenanted to insure. The covenant, therefore, to insure affects the nature, quality, or value of the thing demised, and, therefore, is a covenant which runs with the land, and it is quite clear, that, by the provisions of the 14 G. 3. c. 78. s. 83., the covenant to insure, in the present case, becomes, by operation of law, a covenant to lay out the money recovered in rebuilding the premises, at the request of the lessor; for the enacting part of the clause does not confine the power of the directors to lay out the money to cases of fraud, but is in the alternative, and enables them so to do in any case, upon the request of the party interested. Coupling, therefore, the covenant with the statute, it is, in effect, a covenant to lay out the money recovered in rebuilding the premises, in case the lessor requires it; and that being so, it is clearly a covenant which respects the thing demised, and therefore passes to the assignee.

ABBOTT C. J. It is not necessary, on the present occasion, to give any opinion on the effect of a covenant to insure premises situate without the limits mentioned in the 14 Geo. 3. c. 78. These premises lying within those limits, the effect of that statute is, to enable the landlord, by application to the governors or directors of the insurance office, to have the sum insured laid out in rebuilding the premises. Now a covenant to lay out a given sum of money in rebuilding or repairing the premises, in case of damage by fire, would clearly be a covenant running with the land, that is, such a covenant

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as would be binding on the assignee of the lessee, and which the assignee of the lessor might enforce. Here the defendant does not covenant expressly in those words, but only that he will provide the means of having 800*l.* ready to be laid out in rebuilding the premises in case of fire. But, connecting that covenant with the act of parliament, the landlord has a right to say, that the money, when recovered, shall be so laid out. It is, therefore, as compulsory on the tenant to have the money laid out in rebuilding, and as beneficial for the landlord as if the tenant had expressly covenanted that he would lay out the money he received in respect of the policy upon the premises. For these reasons, I think that this is a covenant running with the land, for the breach of which the assignee of the lessor may sue; and, consequently, there must be judgment for the plaintiff.

BAYLEY J. I am clearly of opinion, that the assignee of the reversion is entitled to sue upon the covenant in question. The rule is, that if the covenant respect the thing demised, and be co-extensive with the estate of the person to whom it is made, and be made with him and his assigns, it passes to his assignee. The only question in this case is, does this covenant respect the thing demised? It is a covenant to insure the premises against damage by fire. By the operation of the 14 *Geo. 3. c. 78. s. 83.*, the effect of that insurance is not merely to put into the pocket of the person effecting it, in case of loss, the amount of the money insured, but to entitle the owner of the estate to have that money laid out on the land; and if such be the effect of the covenant, it does affect the thing demised, as much as a covenant to repair or rebuild, in case of damage by fire.

I think,

I think, therefore, that there must be judgment for the plaintiff.

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HOLBOYD J. I am of the same opinion. If the covenant to insure to the amount of 800*l.*, in case of fire, could be considered as a covenant to pay a collateral sum to the lessor, the present action could not be supported; but, taking that covenant, together with the stat. 14 G. 3. c. 78. s. 83., I think that the sum insured is not to be considered as a collateral sum, but as a sum which, by operation of law, must be laid out upon the premises. It is, therefore, a covenant to do a matter which concerns the land, and falls within the rule laid down in *Spencer's case*, and by Lord Chief Justice *Wilmut* in *Bally v. Wells*. He there lays it down thus: "Covenants in leases, extending to a thing 'in esse,' parcel of the demise, run with the land, and bind the assignee, though he be not named, as to repair, &c. And if they relate to a thing not 'in esse,' but yet the thing to be done is upon the land demised, as to build a new house or wall, the assignees, if named, are bound by the covenants; but if they in no manner touch or concern the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor, the assignee, though named, is not bound by such covenants; or if the lease is of sheep or other personal goods, the assignee, though named, is not bound by any covenant concerning them. The reasons why the assignees, though named, are not bound in the two last cases, are not the same. In the first case, it is because the thing covenanted to be done has not the least reference to the thing demised; it is a substantive, independent agreement, not 'quodam modo,' but 'nullo modo,' annexed

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 against
 SMITH.

or appurtenant to the thing leased. In the case of the mere personalty, the covenant doth concern and touch the thing demised; for it is to restore it or the value at the end of the term; but it doth not bind the assignee, because there is no privity, as there is in the case of a realty between the lessor and lessee and his assigns, in respect of the reversion; it is merely collateral in one case; in the other it is not collateral, but they are total strangers to one another, without any line or thread to unite and tie them together; and to constitute that privity which must subsist between debtor and creditor to support an action." And in page 346., after citing several cases, from which he deduces the principle laid down, he says, "All these cases clearly prove, that 'inherent' covenants, and such as tend to the support and maintenance of the thing demised, where assigns are expressly mentioned, follow the reversion and the lease, let them go where they will." In the present covenant, assigns are expressly included; and, inasmuch as the performance of the covenant would, in the event of the premises being destroyed or injured by fire, tend to the support and maintenance of the thing demised, I am of opinion, that it falls within the rule laid down by Lord C. J. *Wilmot*, and, consequently, that there must be judgment for the plaintiff.

BEST J. It has been argued, from the preamble to the 83d section of the 14 G. 3. c. 78., that this provision of the statute only applies to cases where fraud is suspected. But the enacting part of the clause goes beyond the mischief mentioned in the preamble, and is large enough to embrace this case. For, under the first branch of it, where the owner of the building requests

quests the insurance company so to apply the money, no suspicion of fraud is necessary to make such request compulsory on the directors. Within the district, therefore, to which the building act applies, this covenant provides a fund for the rebuilding of the premises, which the owner has a right to require shall be applied to that purpose; and then it is clear, that the assignee has a direct interest in having the insurance kept up. But I think, also, that if the premises were in any other part of the kingdom, this would be a covenant that would pass to an assignee. A covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the estate assigned. If this were not the law, the tenant would hold the estate discharged from the performance of one of the conditions on which it was granted to him. The original covenantee could not avail himself of this covenant; he sustains no loss by the destruction of the buildings, and therefore has no interest to have them insured. In *The Sadler's Company v. Badcock (a)*, Lord Hardwick says, that Lord Chancellor King, in the case of *Lynch v. Dayrell*, held, that a person who had assigned his interest in a house before the fire happened which consumed it, had no right to the money under the policy. I cannot say whether a court of equity would take any steps to secure the application of the money insured for the benefit of the estate. I presume, that if a court of equity would assist a covenantee to have the money, recovered under the policy by his tenant, expended on the estate, it would render the same assistance to an assignee.

1821.

 VERNON
 against
 SMITH.

(a) 2 Atkyns, 577.

If

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VERNON
vs
SMITH.

If a court of equity will not interfere, either for the one or the other, still this covenant is as beneficial to an assignee as it was to the covenantee. It secures to the tenant the means of performing his covenant, and to the landlord, a solvent instead of a ruined tenant. It is a covenant beneficial to the owner of the estate, and to no one but the owner of the estate; and therefore may be said to be *beneficial to the estate*, and so directly within the principle on which covenants are made to run with the land. At the time that the 32 Hen. 8. c. 34. was passed, an immense quantity of land passed from the dissolved monasteries to the king, and from the king to the most favoured and powerful of his subjects. Much of this land was on lease, and both the king and his parliament must have been anxious that the assignees of the reversion should be in as good a situation as the lessors were. This statute expressly enacts, "that grantees of estates shall have and enjoy the like advantages against lessees, their executors, &c., by entry for non-payment of rent, or for doing of waste or other forfeiture, and the same benefit and remedy by action for not performing of other conditions, covenants, or agreements, as the lessors or grantors themselves might have had." Lord Coke (*Co. Litt.* 215. b.) limits the operation of these general words, to "such conditions as are incident to the reversion as rent, or for the benefit of the estate." He adds that the statute does not extend to "covenants for payment of a sum in gross, delivery of corn, wood, or the like." A sum in gross is in the nature of a fine which belongs to the lessor, and can never be intended for an assignee. By the deliveries of corn and wood were meant deliveries of those articles at the mansion-house of the lessor, and not

rents

rents payable in corn or wood, without any stipulation as to the place where the articles were to be delivered. These deliveries at the mansion-house were inconsiderable in value, and would be of no use to the assignee, unless he became the assignee of the mansion as well as the farm. In *5 Coke*, 18. it is said, "that the 32 *H. 8.* was resolved to extend to covenants which touch or concern the thing demised, and not to collateral covenants." In *Spencer's case*, *Moore*, 159., the same doctrine is laid down in the same terms, and this case is put by *Gandy J.*, and assented to by all the Judges and serjeants, "that a covenant that a lessor will, at the end of the term, grant another lease runs with the land. The covenant here mentioned is not beneficial to the estate granted, in the strict sense of the words, because it has no effect until that estate is at an end, but it is beneficial to the owner, *as owner*, and to no other person. By the terms *collateral covenants*, which do not pass to the assignee, are meant such as are beneficial to the lessor, without regard to his continuing the owner of the estate. This principle will reconcile all the cases. In *Webb v. Russell (a)*, Lord *Kenyon* considers grantees or assignees to stand in the same situation, and to have the same remedy against the lessees, as heirs at law of individuals, or successors in the case of corporations, had before the statute. For these reasons, I am of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

(a) 3 Term Rep. 402.

1821.

VERNON
against
SMITH.

1821.

Monday,
October 22d.

WESTCOTT *against* HODGES.

A., *B.*, and *C.* entered into a bond to the king, the condition of which was, that *A.*, as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage coaches. *A.*, as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. *A sci. fa.* having afterwards issued upon the bond, *B.*, one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt, that *A.* was a person "surety for, or liable for, a debt" of the bankrupt, within the meaning of the 49 G. 3. c. 121. s. 8.; and, consequently, that the latter was protected by his certificate: Held, also, that the general plea of bankruptcy was well pleaded.

THE declaration, after stating the appointment of the defendant to be a subdistributor of stamps, alleged that, "in consideration that the plaintiff, at the request of the defendant, would execute a certain writing obligatory to his majesty, in the sum of 500*l.*, as a security for the defendant, and with a condition, that the defendant should account for all vellum, parchment, &c. he, defendant, promised to save and keep plaintiff harmless and indemnified from all damages, costs, &c. that he should sustain in consequence of the plaintiff's executing the writing obligatory, or by reason of the defendant's breach of the condition thereof." Averment, that the plaintiff executed the bond, that defendant having broken the condition, and the bond having thereby become forfeited to the king, a scire facias issued against the plaintiff and defendant, and one *C. F.*, and that such proceedings were thereupon had, that the plaintiff, to avoid paying the 500*l.* due on the bond, was forced to pay 50*l.* to compromise the suit, and also 61*l.* 1*s.* 9*d.* for his costs, charges, and expences. Plea, that, before the commencement of this suit, defendant became bankrupt, and that the cause of action accrued *before* his bankruptcy.

The cause was tried before *Graham Baron* at the *Hants Summer assizes*, 1819, when a verdict was found

for

for the plaintiff, subject to the opinion of the Court on the following case.

1821.

WESTCOTT
against
HODGES.

The defendant having been appointed subdistributor of stamps for the town of *Ringwood*, in the county of *Southampton*, he, together with the plaintiff and one *Finch* as his sureties, on the 6th *February*, 1812, entered into a joint and several bond for 500*l.* to his majesty, the condition of which was, that if the defendant should well and truly account for all vellum, &c. duly stamped, which he should receive from the commissioners or head distributor of stamps, and for all sums of money which he should receive on account of the duties on personal legacies and stage coaches, and should pay to such commissioners or head distributor the duties payable for such stamped vellum, &c.; and also the price of such vellum, &c., and the duties received by him in respect of personal legacies and stage coaches, then the obligation to be void. In *December*, 1813, the defendant duly rendered to the head distributor of stamps, an account of the money due from him as subdistributor, by which he made himself debtor for 301*l.* In *March*, 1814, he was declared a bankrupt, and the plaintiff and one *Corbin* were appointed assignees, but no dividend has yet been made. He obtained his certificate on the 23rd of *May*, 1814. In *June*, 1815, a scire facias issued against all the parties to the bond at the suit of the king, and the plaintiff, on the 15th *November*, 1817, paid the sum of 50*l.* to compromise that suit. The costs of defending the suit amounted to 61*l.* 1*s.* 9*d.* For these sums the present action was brought.

E. Lawes for the plaintiff, made two points, first, that the statute of the 49 G. 3. c. 121. s. 8. must be specially pleaded, and could not be given in evidence under the
general

1821.

WESTCOTT
against
HODGKINS.

general plea of bankruptcy, given by stat. 5 G. 2. c. 30. s. 7. *Stedman v. Martinant*. (a) And although in that case the immediate point in judgment was, whether defence given by the 49 G. 3. was available under the general issue, yet it appears, by a subsequent report of the case (b), that the defendant, in consequence of the decision of the Court upon the point of pleading, afterwards pleaded a special plea of bankruptcy. It was quite incongruous for the defendant to plead, that the cause of action accrued *before* the bankruptcy, when he meant to rely on a particular statute, applicable only to the case of its having accrued *after* the bankruptcy. And such form of pleading would mislead the plaintiff, instead of giving him any idea of the true nature of the defence. The words of the statute are, that the bankrupt should be discharged of all demands in *like* manner, to all intents and purposes, as if the surety had been a creditor before the bankruptcy; but it does not give any precise form of plea, much less does it require the same form of plea as is given by the stat. 5 G. 2. c. 30. s. 7. Secondly, the bond is, in its nature, wholly incapable of valuation; and therefore not proveable under the commission, *The Overseers of St. Martin v. Warren*. (c) It is a bond for the performance of several things, the non-performance of which would only entitle the plaintiff to unliquidated damages, and it cannot be treated as a divisible bond, so as to allow it to be proved under the commission for damages arising by the breach of one part of the condition, leaving the bond still in force as to the residue, *Taylor v. Young*. (d)

(a) 12 East, 664.

(b) 13 East, 427.

(c) 1 Barn. & Ald. 495.

(d) 5 Barn. & Ald. 525.

The statute 49 G. 3. c. 121. s. 8. was not meant to discharge the bankrupt from any demand, in respect of payment made after the commission, where he would not have been discharged from it by the statute 5 G. 2. c. 30. if payment had been made before the bankruptcy. But this case is not within that statute; first, because the plaintiff was not surety for any debt; secondly, he had not paid the whole debt, or any part thereof, in discharge of the whole. If there was any debt, it was the penalty of the bond; and even if the damages sought to be recovered by the crown, are considered as the debt, the 50*l.* paid by way of compromise for it, was not a legal discharge of the debt without a release. *Fitch v. Sutton.* (d) Thirdly, the statute did not contemplate the case of a surety in a bond to the king, but to a common creditor only who might, or might not, prove his debt under the commission, and be barred by such proof; whereas there is no instance of the crown proving under a commission of bankrupt, nor is the king barred by any of the statutes of bankruptcy, not being specially named in them.

1821.

WESTCOTT
against
HUGHES.

ABBOTT C. J. I am of opinion, that the plea is good both in form and substance, and that this case falls within the 49 G. 3. c. 121. s. 8. The words of that statute are very large. It enacts, "that where, at the time of the issuing of the commission, any person shall be surety for, or liable for any debt of the bankrupt, it shall be lawful for such surety, or person liable, if he shall have paid *the debt*, or any part thereof, in discharge of the whole debt, although he may have paid

(a) 5 East, 239.

the

1821.

WESTCOTT
against
HOBBS.

the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor as to the dividends upon such proof, and when the creditor shall not have proved under the commission, it shall be lawful for such surety or person liable, to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and to receive a dividend proportionably with the other creditors taking the benefit of such commission, notwithstanding such person may have become surety or liable for the debt of the bankrupt, after an act of bankruptcy had been committed by such bankrupt, and every person against whom such commission of bankrupt has been awarded, and who has obtained his certificate, shall be discharged of all demands, &c." In order to bring the case within the statute, it is not necessary that the principal creditors should be enabled to prove, or that the bankrupt should be discharged by his certificate, if he does not; and it seems to me, that this case does not differ from the case of a surety in a bond to a private person. It has been contended, that this is not to be considered as a debt, but we are of opinion, that it may be considered as a debt in the strictest sense of the word. In the first place, the penalty might be sued for as a debt at law. Besides, debts may arise out of the breach of the condition of a bond framed as this is. For a debt is thereby created as much as in the case of a contract for goods sold and delivered, or money had and received. For these reasons, we are all of opinion, that this is a case coming within the section of the statute. Another point has been made upon the form of the pleadings, viz. that the bankruptcy should have been specially pleaded;

pleaded. We are, however, of opinion, that the general plea is sufficient in this case. There is no decision to shew, that the plea in the general form will not do. Now the 49 G. 3. c. 121. s. 8. enacts, "that the bankrupt who has, or shall obtain his certificate, shall be discharged at the suit of every such person, having so paid, or being thereby enabled to prove as aforesaid, or to stand in the place of such creditor as aforesaid, with regard to his debt in respect of suretyship or liability, in like manner to all intents and purposes, as if such person had been a creditor before the bankruptcy." Now we think the obvious meaning of this is, that the bankrupt should have the same benefit of a precise form of pleading, as if the debt had arisen before the bankruptcy, and that a payment made by a surety after the bankruptcy, places the party in the same situation as if the payment had been made before the bankruptcy by any other person. We are therefore of opinion, that the plea is good both in substance and form, and consequently that the *postea* must be delivered to the defendant.

Judgment for defendant.

1821.

WESTCOTT
against
HODGES.

1821.

Monday,
October 22d.

DOE Dem. JOHN HURRELL and EDWARD LIVER-
MORE against ROBERT DEVEREUX FANCOURT
HURRELL and Others.

A testator having both real and personal estate, after giving several pecuniary legacies, bequeathed all the rest and residue of his estate and effects, whatsoever and wheresoever, to trustees, their executors, administrators, and assigns, upon trust; that they should, out of such residue of the monies and effects that he should die possessed of, carry on, manage, and cultivate the farm then in his possession for the remainder of his term therein, for the joint advantage of certain of his sons and daughters therein named; and, at the expiration of the said term, upon further trust, to sell and dispose of such residue of his estate and effects, or such effects as should then be upon his said farm, and to divide the money arising therefrom among his said sons and daughters: Held, that the testator's real estate did not pass by this will.

EJECTMENT, to recover the possession of certain premises in the county of *Essex*. The cause was tried at the *Essex* Spring assizes, 1820, before *Garrow B.*, when the jury found a verdict for the lessors of the plaintiff, subject to the opinion of the Court, on the following case.

On the 21st of *May*, 1805, *Moses Hurrell* the elder, being seised in fee of the freehold premises in question, and being also possessed of personal property, made his last will, duly executed to pass real estates, as follows: I give unto my sons, *John, Aaron, William, Charles*, and *Thomas*, and to my daughters, *Susanna* and *Rebecca*, the sum of 100*l.* a-piece, to be paid to such of them as shall be under the age of 21 years at the time of my decease, upon their attaining the respective ages of 21 years; and to such of them as shall have attained their respective ages of 21 years at that time, within six months after my decease; with benefit of survivorship among them, in case of the death of any or either of them under the age of 21 years. And as I have already provided for my son *Moses*, and my daughter *Sarah*, the wife of *Edward Livermore*, I do hereby only give them the sum of 10*l.* a-piece for mourning, to be

paid

paid to them respectively within six months after my decease. And after payment of the above-mentioned legacies, my just debts, funeral, testamentary, and other incidental expences, I give and bequeath all *the rest and residue of my estate and effects whatsoever and wheresoever*, unto my brother, *Aaron Hurrell*, my said son *John*, and my said son-in-law, *Edward Livermore*, their executors, administrators, and assigns, upon the following trusts; that is to say, upon trust, that they shall, out of such residue of the monies and effects that I shall die possessed of, carry on, manage, and cultivate the farm now in my possession, for the remainder of my term and interest therein, for the joint advantage of my said sons, *John, Aaron, William, Charles, and Thomas*, and my said daughters, *Susanna and Rebecca*; and at the expiration of the said term, upon further trust, to sell such residue of my estate and effects, or such effects, as shall then be upon my farm, and divide the money arising among his said last-mentioned five children. And I do hereby appoint my brother *Aaron Hurrell*, my said son *John*, and my son-in-law, *Edward Livermore*, executors of this my will."

1801.

Dec dem.
Hurrell
against
Hurrell.

The testator died in *February* 1807, and on the 25th *March*, 1808, the will was duly proved by the executors. The tenant in possession of the estate under the testator, after his death, paid one half-year's rent, due for the premises, at *Lady-day*, 1807, to the lessors of the plaintiff, who are the surviving devisees in the will, and to the said *Aaron Hurrell*, since deceased; after which payments, the said *Robert Devereux Fancourt Hurrell* being the heir of the testator, in that character and right, entered into possession of the estate and premises,

1821.

DOE dem.
HURRELL
against
HURRELL.

mises, and he, together with the other defendants, hath thence and hitherto retained possession thereof.

Sugden, for the plaintiff. The real estate passed by this will to the trustees. The object of the testator was to provide for all his children, and he gives and bequeaths all the residue of the estate and effects to the trustees, for that purpose. If the will had stopped here, it is quite clear that the real estate would have passed by those words; but it goes on, "In trust, out of such residue of the monies and effects, to manage his farm to the end of his term." It may therefore be said, that the testator only meant to give to them the residue of his monies and effects; but then the trustees, at the expiration of the term, are directed to sell and dispose of the residue of his *estate and effects*, and therefore the testator must have intended more to pass than his monies and effects. Besides, the real estate will pass under these words, provided it appear, from the other part of the will; that he intended it to pass. *Doe, Lessee of Wall v. Langlands* (a), and *Doe, dem. Andrew v. Lainchbury*. (b) Now here, by the use of the words, "residue of his estate and effects," it does appear, that the testator meant the real estate to pass.

H. J. Stephen, contra, was stopped by the Court.

ABBOTT C. J. We are all clearly of opinion, that the testator did not mean that his real estate should pass by this will. We must collect the intention from the whole context of the will. There can be no doubt,

(a) 14 East, 370.

(b) 11 East, 290.

that

1821.

 Don dem.
 HURRELL
 against
 HURRELL,

that words, which, in their technical sense, generally denote personal property, will pass the real estate, if such appears from the whole of the will, taken together, to have been the intention of the testator. It is quite clear, that the testator here intended that his personal property only should go to the trustees. The bequest is to them, their executors, administrators, and assigns; the word "heirs" is not used. That circumstance is not indeed very strongly to be relied on; but it is not to be altogether rejected in construing this will. The nature of the trusts clearly shews, that the testator meant to bequeath his personal property only, for the trustees are directed, out of such *residue* of the monies and effects, to manage the farm for the remainder of his term. Now the real estate was not applicable to such a purpose, for the trustees, at all events, had no power to sell any part of the estate bequeathed to them, until the end of the term. Then the testator directs the trustees, at the expiration of his term, to sell such residue of his estate and effects; or *such effects as shall be upon his said farm*. It appears to us therefore, that, by using the latter word, he himself has furnished a comment upon the words *the residue of his estate and effects*; and that by those words, he meant only such estate and effects as constituted personal property. Inasmuch, therefore, as it was not necessary that the trustees should take the real estate, and as it was not suitable to the purposes of the trust, we are of opinion that the real estate did not pass by the will, and consequently, that there must be judgment for the defendants.

Judgment for defendants.

1821.

Tuesday,
October 22d.STEELE *against* MANNS.

A. having purchased an estate free from rectorial tithe, with a right of common thereto annexed; the common was afterwards inclosed under an act of parliament, and certain land was allotted to *A.* in lieu of his said right of common: Held, that no tithe was payable in respect of the allotted land.

THE plaintiff declared in debt upon the statute 2 and 3 Edward 6. c. 13., as the farmer and proprietor of the tithes of corn arising from land in the parish of *Catherington*, in the county of *Southampton*, against the defendant as occupier of land in that parish, and charged that the defendant had carried away his corn without setting out the tithe, whereby an action had accrued to the plaintiff, to demand and have of the defendant treble the value of the said tithe. Plea nil debet. At the trial before *Graham Baron* at the Summer assizes, 1819, for the county of *Southampton*, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

The plaintiff claimed the tithes in question, as the tenant for an unexpired term of years, of Sir *Lucas Curtis*, the lay impropriator of the rectorial tithes of the parish of *Catherington*. By an inclosure act of the 50 G. 3. c. 218. for disafforesting the forest of *Bier*, in the county of *Southampton*, and for inclosing the open commonable lands within the forest, after reciting (section 41.) that the 600 acres of land thereby vested in his majesty, being taken out of different parishes, the persons entitled to the tithes of such parishes might be injured thereby, it was enacted, that out of the said open commonable lands thereby directed to be divided and inclosed, allotments should be made to the persons entitled to the tithes of such parishes, of so much land as should be in the judgment of the commissioners, a

full

1821.

 STEELE
 against
 MANN.

full compensation for such injury. And it was further enacted (section 42.) that the commissioners should, in the next place, allot the residue of the said open commonable lands and grounds respectively to, and among the persons entitled to commonage. "Provided, (section 43,) that nothing in the said act shall extend, or be construed to extend, so as to prejudice, lessen, or defeat the right, title, or interest of the several rectors, vicars, and lay impropriators of the several and respective parishes, townships, hamlets, or places of *Soberton, Hambleton, Catherington, &c.* or any person or persons whomsoever, in, or to any tithes, great or small, arising or renewing out, or payable for, or in respect of any lands, tenements, hereditaments, within the same several parishes, &c. but such great and small tithes shall be paid and payable, at all times hereafter, in such and the same manner as they would have been, in case this act had not been made." Before, and at the time of passing of this act of parliament, *John Ring* esquire was the owner of an estate at *Love Dean*, in the parish of *Catherington*, and the tithes arising from such estate, for which estate, as consisting of 120 customary acres of arable, pasture, and coppice land, in the occupation of *Edward Manns*, free from rectorial tithe, (but which tithe had been purchased with the estate,) situate, and being at *Love Dean*, in the parish of *Catherington*, he claimed a right of common from the commissioners under the foregoing act, who thereupon awarded to *Mr. Ring*, in right of the last mentioned estate, five acres and 17 perches of the open and commonable lands of the forest of *Bier*, situate in the parish of *Catherington*. The defendant, *John Manns*, became the tenant of two acres, part of such five acres and 17 perches so allotted

1821.

STEELE
against
MAYNE.

to Mr. Ring, and in the year 1817, sowed such two acres with oats, and afterwards cut and carried away the crop without setting out the tithe. The tithe was demanded, but refused, on the ground that, as the allotment had been made in respect of land not paying tithe, the allotted lands were exempt from the payment of tithe.

Selwyn for the plaintiff, contended, that he was entitled to recover. It does not appear, whether the right of common, in respect of which the allotment was made, was tithe free. The language of the conveyance might or might not be large enough to convey to Mr. Ring the tithes of the common. In *Lord Gwydir v. Foakes* (a) it was holden, that, by a grant of all tithes arising out of, or in respect of farms, lands, &c. the tithes arising out of, and in respect of common appurtenant to such farms or lands will pass. Here, however, no conveyance is stated, and it is rather to be collected from the language of the case, that the tithes of the estate alone, and not the tithes of the right of common appurtenant to such estate, had been purchased. If this view of the case be correct, it can hardly be contended, that the common being liable to the tithes, the allotment in lieu of it would be exempt. Indeed the contrary would follow, as appears from *Moncaster v. Watson*. (b) But admitting that the right of common were tithe free, would it be a necessary consequence, that the land allotted in lieu thereof should also be tithe free? The demand of the impropiator in the present case, is a demand of the tithe of corn. But

(a) 7 T. R. 641.

(b) 3 Burr. 1375. 1 Bl. 402. S. C.

corn could not be part of what grew upon the common; the tithes that arose in respect of the common, could only have been tithes of agistment, or of lambs, calves, wool, milk, and other things that could be the produce of a common. Suppose the owner of a farm, liable to tithes of corn, and also to an agistment tithe, should agree with the person that he should hold his land free of agistment tithe, and afterwards, upon a demand made of the tithes of corn, should plead this agreement, it would hardly be considered as an answer to the demand. The case of *Stockwell v. Terry* (a) is distinguishable from the present; for there there was an express agreement, that the parties should enjoy their rights in severalty, as they did their rights of common. And Lord Hardwicke in delivering his opinion, mainly relied on that agreement. Here there is no such express agreement, and none can be implied; for a claim of tithe can only be discharged by special words. *Parkins v. Hinde*. (b)

1821.

 STEELE
against
MANN.

E. Lawes contra, was stopped by the Court.

ABBOTT C. J. I am clearly of opinion, that the plaintiff is not entitled to recover. The facts are these, John Ring being the owner of an estate of 120 acres, and the tithes arising therefrom, (which tithes he had purchased with the estate,) had allotted to him, under an inclosure act, certain land in lieu of a right of common appurtenant by custom to his estate. The plaintiff, who is the tenant of the lay impropriator, claims tithe in respect of such allotted land, and the question

(a) 1 Ves. 117.

(b) Cro. Eliz. 161.

1821.

STRELL
against
MANN.

substantially is, whether the lay impropriator, who has sold the tithe of the estate, is entitled to the tithe of land allotted to the owner of that estate, in lieu of a right of common which was appurtenant by custom to the land. It is quite clear, that after the lay impropriator had thus sold the tithes of the estate, no tithe was payable at least before the passing of the inclosure act. Before the sale, the tithe was payable equally in respect of all cattle feeding on the enclosed as on the common land. When the lay impropriator sold the tithes of the estate, he therefore sold all the tithes in respect of all cattle feeding, both upon the enclosed and the common land. And I am of opinion, that inasmuch as no tithe was payable before the inclosure act, in respect of the cattle feeding on the common land, no tithe is payable now in respect of the land allotted to the owner of the estate, in lieu of such right of common. This case is very distinguishable from the case of *Moncaster v. Watson* (a), for the land, in respect of which the allotment was there made, was not wholly free from the payment of tithe; the exemption claimed was merely from the tithe of corn, grain, and hay, neither of which the common, while uninclosed, was capable of producing. The tithe of agistment would therefore remain payable, notwithstanding the exemption. Here, the owner of the land is the owner of the tithes, for the effect of the conveyance must have been to make the owner of the estate the owner of all the tithes of the land, and I am of opinion, that the owner of the estate becomes the owner of the tithes of land allotted to him, in respect of a right of common

(a) 3 Burr. 1375.

appurtenant to that estate. The postea must therefore be delivered to the defendant.

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HOLROYD J. I am of the same opinion. I am quite satisfied, from the case of *Stockwell v. Terry*, and the reasoning of Lord Kenyon in the case of *Lord Graydir v. Peakes* (a), that the plaintiff is not entitled to the tithes of the allotted land, but that the person who is entitled to the tithes arising out of the estate, is also entitled to the tithes arising out of the allotted land, in like manner as he would have been entitled to tithes arising out of the beneficial enjoyment of the right of common appurtenant to that estate, in case the inclosure act had never passed. (b)

BEST J. concurred.

Judgment for defendant.

(a) 7 T. R. 641.

(b) Bayley J. was absent at Chambers.

HUDSON against GRANGER.

Wednesday,
October 24th.

ASSUMPSIT for the price of coals. The declaration contained two special counts on a contract between the parties, and also counts for goods sold and

The owner of goods being indebted to a factor in an amount exceeding their

value, consigned them to him for sale: the factor being also similarly indebted to *I. S.*, sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between *I. S.* and the assignees, *I. S.* allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.

By 47 G. 3. *sess.* 2. c. 28. s. 29., "All contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market." A factor having coals consigned to him for sale by *A*, sold the same, and entered the contract in his book as having been made for *C*, the master of the ship. It was not signed by the purchaser; but in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted: the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade to do so. Query, whether, under the circumstances, an action might be brought in the name of *C* for the price of the coals.

delivered.

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delivered. At the trial before Lord *Ellenborough C. J.*, at the sittings after *Michaelmas* term, 1817, a verdict was found for the plaintiff for 110*l.* 6*s.* 6*d.*, subject to the opinion of the Court on the following case :

The plaintiff was the owner or master of the ship *Maria*, and was employed in the coal trade by one *John Hollowell*, who was owner of the cargo of coals by that ship, a part of which was the subject of this action. The ship and cargo were addressed by *Hollowell* to *Robert Clark*, a factor. On the 10th of *April*, 1816, the defendant agreed with *Clark* to purchase of him part of the *Maria's* cargo, and in the contract entered by the factor in his book, the coals were stated to be purchased of *Robert Clark*, factor for *Hudson*, master or owner of the ship *Maria*. It was not signed by the defendant, or any person by him authorised, but in the copy delivered by the factor to the clerk of the market, the names of the defendant and of the factor were inserted at full length. By the 47 *G. 3. sess. 2. c. 68.* (local and personal) *sec. 29.*, it is enacted, "that all contracts for coals between buyer and seller, shall, by the crimp factor, be fairly entered with the conditions thereof, and price of such coals, in a book to be kept by such crimp factor, subscribed by such buyer, and by the crimp factor, with their names writtē at full length, and a true and perfect copy of such contract, and the price of such coals, shall be delivered by such crimp or factor to the clerk of the market, within one hour after the close of the market on that day, for the inspection of any person." *Clark* was authorised by *Hollowell*, not only to sell, but to receive the price of the coals. *Hudson* had no interest in the cargo, and his name was inserted in the contract without his authority, it being
the

the usual practice so to insert the name of the master. The coals were delivered to the defendant, pursuant to the contract. In *June*, 1816, *Clark* became a bankrupt. At the time of the purchase, *Clark*, who, for a considerable time, had had dealings with the defendant, was indebted to him in 272*l.* 5*s.* 4*d.*, for money lent and advanced to, and paid for *Clark* in the regular course of business; and in the month of *January*, 1817, prior to the plaintiff bringing this action, an account was settled between the defendant and the assignees under *Clark's* commission, in which the assignees allowed the defendant to deduct the price of the coals from the debt due to the estate, and he then proved the balance under the commission. At the time of the sale of the coals, and continually from thence up to the time of the bankruptcy of *Clark*, *Hallowell* (who has also since become bankrupt) was indebted in a considerable sum to *Clark*, and after giving credit to *Hallowell* for the price of the coals on the *Maria*, the balance remained considerably in favour of *Clark*.

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F. Pollock for the plaintiff. This action is maintainable in the name of *Hudson*, because he was the person whose name was entered in the book of the factor, and also in the copy delivered to the clerk of the market. The defendant, therefore, might have learnt with whom the contract was made, and he cannot now be allowed to say, that the contract was not made with the present plaintiff. If the defendant had signed the contract, as required by the 47 G. 3. c. 68., there can be no doubt that the plaintiff might have sued. Assuming however, that the action was maintainable in the name of *Hudson*, the settlement which has taken place between
 the

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the defendant and the assignees of the bankrupt, cannot operate as any answer to the present action, for admitting, that this case must be considered as if the action were brought in the name of *Hallowell*, this settlement took place after the bankruptcy of *Clark*, and, although a payment to him before his bankruptcy would have been a valid payment, as against his principal, because he had authority to receive the money, yet his bankruptcy was a revocation of that authority, and therefore the payment was not made to an agent authorised to receive it, and consequently is not a valid payment as against *Hallowell*.

Gaselee contra. The bankruptcy of the factor would certainly operate as a revocation of his authority to receive payment on account of his principal. Here, however the payment was made, not merely on the account of *Hallowell* alone, but it was made to *Clark* or his assignees, who stand in the same situation in respect of the lien which he had against *Hallowell*.

The Court were about to pronounce judgment, when

F. Pollock in reply, suggested, that *Clark* never had any lien in this case, because, by the provisions of the 47 G. 3. c. 68., coals must be sold while in the ship, except in the case of a sale to government; the property, therefore, immediately passes from the vendor to the vendee, and the factor, therefore, never had a possession so as to give him a lien.

(a) BAYLEY J. I am of opinion that the plaintiff is not entitled to recover. The stat. 47 G. 3. c. 68. sess. 2.

(a) *Abbott C. J.* was sitting at the Old Bailey.

was

was framed with the view, that coals which reached the market should not be warehoused for the benefit of the original sender of the coals, but that he should sell as soon as the ship arrived, or that the coals should be kept in the ship, and the ship thereby detained till an actual sale took place. The legislature did not intend by the provisions of that statute, to interfere with the rights of a factor. In this case, *Clark* is described as the factor of *Hallowell*. It seems to me, that when the coals arrived, the ship having been addressed to *Clark* as factor, and he having the complete control of the coals in that character, the ship is to be considered as the warehouse of *Clark*, for the coals then in the ship, and the coals are to be considered in his possession. If that be so, then the question is, whether that which has passed between the assignees of *Clark* and *Granger*, takes away from *Hallowell* the right to sue in *Hudson's* name; and it seems to me that it does. *Clark*, as factor, had a lien on every thing in his possession, and he therefore had a lien upon these coals. As factor too, he had a general lien, not only on the article when in his possession, but on the price of the article when sold, and having that lien, he may enforce payment to himself in opposition to the principal. That being so, *Clark* in this case sells to *Granger* the goods of *Hallowell*, who at that time was indebted to *Clark* in more than the price of these goods. The latter having a lien on the price, might insist that *Granger* should pay him, and that *Hallowell* should not receive the money. *Clark* afterwards becomes bankrupt, and his bankruptcy undoubtedly would have operated as a countermand of his authority, to receive the price on account of his principal; but it does not operate to destroy

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destroy his right to receive it on his own account in respect of his lien. That being the situation of the parties, the defendant afterwards comes to a settlement with the assignees of *Clark*, the effect of which was, that *Granger* paid to *Clark's* assignees the price of the coals, which *Clark* till his bankruptcy had a right to insist should be paid to him, and which his assignees had the same right to insist upon afterwards. It seems to me therefore, that this was a valid payment as against *Hallowell*, and that he cannot now, either in the name of *Hudson*, or in his own name, sue for payment a second time. Upon the other question, whether the action can be maintained in the name of *Hudson*, he having no interest in the contract, I entertain considerable doubt. If the defendant be bound to admit, that the contract was made by him with *Hudson*, then the latter would be the party entitled to sue. Now as *Hudson's* name was in the contract, and the defendant might have seen it, if he pleased, I incline to think that he is bound by the terms of the contract, and that he is not at liberty now to say, that *Hudson* was not the party with whom he contracted. It is unnecessary to pronounce any judgment upon that point, inasmuch as I am clearly of opinion upon the other ground, that there must be judgment of nonsuit.

HOLROYD J. It is unnecessary to decide in the present case, whether the action can be maintained in the name of *Hudson*; because, I am clearly of opinion upon the other point, that there must be judgment of nonsuit. It appears to me, that *Clark* was factor and not a mere broker; and that being so, I am of opinion, that he had a lien not only on the goods while they remain-

remained in his possession, but also on the proceeds of the goods which he sold as such factor. In *Drinkwater v. Goodman* (a) it was expressly decided, that a factor who becomes surety for a principal, has a lien on the price of the goods sold by him for his principal, in the amount of the sum for which he has become surety, and Mr. Justice *Chambre*, in *Houghton and Others v. Matthews* (b), considers that as settled law. *Clark*, therefore, having a lien on the proceeds, had a right to receive the price from the buyer, and when he had so received it, to retain it as against *Hallowell*. The bankruptcy of *Clark* could not operate to destroy his right of lien, though it would operate as a revocation of his authority to receive any money on account of his principal. His assignees after the bankruptcy, had the same rights as the bankrupt had before. A payment made to *Clark* before his bankruptcy, even against the will of *Hallowell*, would have operated as a valid payment as against *Hallowell*, and a payment to his assignees afterwards must have the same effect. For these reasons, I am of opinion, that the settlement between *Clark's* assignees and the defendant operated as a valid payment, and consequently that this action cannot be maintained.

BEST J. I am of the same opinion. This action is brought in the name of the present plaintiff for the benefit of *Hallowell*, and it must be therefore considered, as if it were brought by the latter. Now the facts are these: *Hallowell* sells the coals to *Granger*, by the means of *Clark*, his factor; *Hallowell* being then in-

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(a) *Cowper*, 251.(b) 3 *Bos. & Pul.* 489.

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debted to *Clark* beyond the price of the coals, *Granger* pays the money to *Clark*. Now, *Clark* as factor, having a lien on the coals, and on the proceeds when received, had a right to require that the money should be paid to him, and not to his principal, and he also had a right even to retain the money against his principal. The payment to *Clark*, or to his assignees, who stand in his place, was therefore a valid payment as against *Hallowell*, and is a good answer to the present action. It is unnecessary to decide, therefore, whether this action could be maintained in the name of *Hudson*, inasmuch as I am clearly of opinion, that upon the other point, there must be judgment of nonsuit.

Judgment of nonsuit.

Thursday,
October 24th.

RICHARD EATON, CHARLES HAMMOND, and
CHARLES HAMMOND, JUN. - Plaintiffs;

AND

HENRY BELL, CHARLES WEDGE, and JOSEPH
TRESLOVE, - - - Defendants.

An inclosure
act empowered
the commis-
sioners to make
a rate to defray
the expenses

ASSUMPSIT for money had and received, &c. and for interest. Plea, general issue. At the trial before *Dallas C. J.*, at the *Cambridge* Summer assizes, 1819, a

of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners. Expenses were incurred in the execution of the act before any rate was made. To defray these expenses the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts: Held, that the commissioners were personally responsible to the bankers for the drafts so made.

The latter having from time to time made half-yearly rests in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging of interest half-yearly was not unlawful on the ground of usury.

verdict

verdict was found for the plaintiffs. On a motion for a new trial on the part of the defendants, and on a motion on the part of the plaintiffs to have the compound-interest added to the verdict, the Court directed a case to be stated.

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A private inclosure act for allotting lands in the parish of *Fordham*, was passed in the 49 G. 3., by which the defendants were appointed commissioners. This act provides "That the acts of two commissioners shall be as valid as if done by all. That new commissioners shall be appointed in case any of the first appointed commissioners should die. That the expences of passing and executing the act shall be paid by the proprietors in such shares and proportions as the commissioners shall direct. That the commissioners shall make a rate, and in case of non-payment, shall have power to levy the same, together with interest, by distress. That persons advancing money for defraying the expences shall be repaid the same, with 5 per cent. interest, out of the first monies that shall be raised by the commissioners." Mr. *Weatherby* was appointed auditor of the commissioners' accounts, which were to be examined and balanced by him at least once in every year, and no charge was to be binding or valid in law unless the same was duly allowed by him.

The plaintiffs were bankers at *Newmarket*. On the 1st of *July*, 1809, the defendants held their first meeting under the act, at which the plaintiffs were duly appointed bankers. They accepted the appointment, and acted as such. Various expences were incurred in the execution of the act before any rate was made upon the proprietors, such as making the new roads and drains. The defendants commenced drawing upon

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the plaintiffs in *October*, 1809, to defray these and other expences, and between that time and *June*, 1812, the plaintiffs had advanced 3329*l.* 18*s.*, without having received any money from the defendants. On the 5th of *June*, 1812, the defendants made a rate upon the proprietors to the amount of 8446*l.* 18*s.* 5*d.*, and in *Nov.* 1817, another rate, to the amount of 3845*l.* 8*s.* 4*d.*, a very considerable part of which sums remained unpaid. The account continued open until *December*, 1818, when a balance of 2240*l.* 14*s.* 10*d.*, including compound interest, as hereinafter mentioned, was due to the plaintiffs. During the whole of the time the plaintiffs were greatly in advance to the defendants. No interest was charged by the plaintiffs until *December*, 1811, when 145*l.* 8*s.*, the simple interest then due upon all the sums previously advanced, was added to the debt; and from *January*, 1814, half-yearly rests were made in the accounts, and the interest added to the principal sum advanced. The defendants generally held their meetings at *Newmarket*, where the plaintiffs reside; and the defendants, by themselves, their clerk or solicitor, were in the habit of taking their banking-book to the plaintiffs to have the account made up: each of the defendants did so from time to time, and no objection was ever made by the defendants to the charges for compound interest. It was the general practice of the plaintiffs to make such half-yearly rests. Mr. *Weatherby*, the auditor named in the private act, was not applied to by the defendants to audit their accounts until *December*, 1818, when the account for the balance of which this action was brought, was submitted to, and allowed by him. The drafts were in the following form: "*Fordham* Inclosure, *October* 15th, 1810.

Messrs.

Messrs. *Eaton, Hammond and Son*, pay *John Morgan*, or bearer, forty pounds, on account of the public drainage, and place the same to our account, as commissioners of the above inclosure." At the trial, the Chief Justice stated to the jury, that the question for them to determine was, whether credit was given by the plaintiffs to the defendants personally, or to the fund which they had power to raise. The jury found a verdict for the plaintiffs, damages 1957*l.* 15*s.*, deducting 282*l.*, the sum charged for compound interest, with leave for the plaintiffs to move to add that sum to the verdict, if they were by law entitled to recover it.

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Dover, for the plaintiffs. The commissioners are personally liable. They employed the defendants as their bankers. They borrowed the money, and had the means of paying it out of the rates which the act of parliament authorized them to raise. In *Horsley v. Bell* (a), a bill having been filed by the plaintiff, the undertaker of a navigation at *Thirsk*, in *Yorkshire*, against the commissioners named in the act for carrying it on, who had signed the several orders; it was contended, first, that the defendants were not personally liable, because they were exercising a public trust, and the credit was given to the undertaking itself, and not personally to them, and the remedy was therefore in rem; secondly, that those who had been present at the meetings, and had signed some, but not all the orders, were liable only to those which they had respectively signed. But Lord Chancellor *Thurlow*, assisted by *Ashurst* and *Gould* Justices, held, first, that the

(a) 1 *Brown, Ch. Ca.* 101. *Ambler*, 770.

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commissioners were personally liable; and, secondly, that they were all liable in respect of all the orders. Lord *Thurlow* says, "Who would make a contract on the credit of toll, which it is in the power of the commissioners to raise or not at their pleasure? Then, upon whose credit must the contract be? Certainly that of the commissioners who act. It is their fault if they enter into contracts when they have not money to answer them. They have made themselves liable by their own acts." That case is an authority to shew, first, that the commissioners are personally liable; and, secondly, that they are all liable for the orders given by the others. The defendants are liable to pay the compound interest charged in the account. It is clear that they assented to this mode of keeping the accounts, and therefore they must be liable, unless it be unlawful. Now, in *Bruce v. Hunter* (a) it was held, that an agent who had advanced monies for his principal, in effecting insurances and other mercantile business, was entitled to charge interest, and at the end of every year to make a rest, and add the interest then due to the principal. And in *Ex parte Bevan* (b), it was held by Lord *Eldon*, that although a contract a priori for a loan for twelve months, settling the balance at the end of six months, and that the interest should carry interest for the subsequent six months would be bad as a contract for more than 5 per cent. per annum interest: yet, if at the end of the six months the parties agree to settle the accounts, and strike the balance (that not being part of the prior contract), and to forbear the whole balance for the next six months, that practice is legal. That case is an

(a) 3 *Campb.* 467.(b) 9 *Ves. jun.*

authority

authority to shew, that the mode of charging interest by making a rest at every six months, is not unlawful; and, consequently, plaintiffs in this case are entitled to recover the compound interest charged in the account.

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Robinson contra. In *Horsley v. Bell*, the commissioners had a power to defray their expences; and the Court held, that persons employed by them, might reasonably look to such money as a fund, and that it was the fault of the commissioners if they contracted engagements before they had the means of defraying them. Workmen could not be expected to give credit to the undertaking. But all these grounds for that decision fail here. The commissioners acted in furtherance of the very object of the legislature in borrowing this money, and the act expressly provides for the repayment of monies so advanced "out of the first monies that shall be raised by the commissioners." It would be a mockery to say to them, you shall not borrow till you have the means of repaying; for then, why should they borrow? The plaintiffs were appointed bankers by the proprietors, not the commissioners. They acted under the act. They must be taken to know its provisions. They advanced the money under the power given, and their own contract must be taken to be, that they were to be repaid out of the first monies. They were so repaid in part. They will be paid the remainder: but they cannot sue the commissioners in their personal character. It would otherwise be extremely unjust, for then the action would lie against the survivors, and the executors of the survivor of the old commissioners, and in the meanwhile the new com-

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missioners would possess themselves of the effects. **This** could not be the intention of the parties. The plaintiffs knew that the commissioners were not to pay out of their own pocket, and that brings the case within *Macbeath v. Haldimand* (a), *Unwin v. Woolseley* (b), *Rice v. Chute*. (c) As to the legality of making half-yearly rests, the modern cases certainly seem to sanction what looks like an infringement of the rule, that compound interest shall not be taken; but here is no express admission of the correctness of the accounts.

ABBOTT C. J. Upon principle, as well as upon the authority of the case of *Horsley v. Bell* (d), I am clearly of opinion, that the commissioners in this case were personally liable, that the question was properly submitted to the jury by the learned Judge, and that they have drawn a right conclusion. As to the question of compound interest, it is now settled, that a party advancing money to another is entitled to charge interest, and at the end of every year, then to add the principal to the interest. In *Ex parte Bevan* (e) it was expressly held, that although an antecedent contract for a loan for twelve months, to settle the balance at the end of six months, and that the interest should carry interest for the subsequent six months, would be bad; yet, that an agreement at the end of six months to settle accounts, (that not being part of the prior contract,) and then a stipulation to forbear the balance then struck for those six months, is legal. It is clear from the facts stated, that the defendants assented to that

(a) 1 T. R. 172.

(b) 1 T. R. 674.

(c) 1 East, 579.

(d) 1 Brown, Ch. Ct. 101. Ambler, 707.

(e) 9 Ves. jun. 225.

mode of keeping the accounts, and the bankers who advanced the money might have done it on the faith that they should have been permitted to convert the interest from time to time into capital; and that they would not otherwise have continued to make the advances. I think, that upon the authority of the case cited, the plaintiffs are entitled to recover the interest charged, and consequently that the verdict must be entered for the larger sum.

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BAYLEY J. I am of the same opinion. The form of the draft is to pay *A. B.* or bearer on account of the public drainage. The persons therefore, who signed that order, assert that the money is to be applied to the purpose of the public drainage. The draft then goes on, "and place the same to our account as commissioners of the inclosure act." Therefore, the money is to be placed to their debit in the account, which they have as commissioners. It does not say, "place the same to the account of the inclosure," but "to our account as commissioners." (a) Now, the defendants must have known what they had collected, and what means they had of collecting more; and they ought to have taken care before they drew drafts, that they had money to reimburse the persons who advanced money on those drafts. I think, therefore, that there must be judgment for the plaintiffs.

BEST J. (b) concurred.

Judgment for the plaintiffs.

(a) See *Burrell v. Jones*, 3 Barn. & Ald. 47.

(b) *Hobroyd J.* was at Chambers.

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Thursday,
October 24th.

VANSANDAU against BURT.

Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c.; and then averred that plaintiff did assign the bill. It appeared that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff by deed assigned to the defendant the bill, and all sums of money due thereon, to and for the defendant's own use; and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill. Held, that the declaration imported that the plaintiff had made an absolute assignment of the bill, and consequently, that the assignment in evidence being only conditional, this was a fatal variance.

DECLARATION stated, that in consideration that plaintiff would assign to defendant a bill of exchange for 692*l.*, dated 24th April, 1815, accepted by Jackson, Goodchild, and Co., payable to the order of J C., 70 days after date, defendant undertook, &c. Averment, that plaintiff did assign the said bill of exchange to the defendant, &c. The bill mentioned in the declaration had been formerly assigned by the defendant to the plaintiff in part-payment of a debt, and the acceptors had since become bankrupts. Under these circumstances it was agreed between the plaintiff and the defendant that the former should give up to the defendant the bill in question, the latter requiring it for the purposes of some arbitration; but that the defendant should pay to the plaintiff from time to time such sums of money as should be equal to the dividends upon the sum of 692*l.*; which might become payable under the estate of the drawers, acceptors, or indorsers of the bill. In pursuance of this parol agreement a deed was executed between the parties, which, among other things, recited, that the defendant had requested the plaintiff to re-assign the said bill of 692*l.* to the defendant, which plaintiff had agreed to do upon the covenants in the indenture contained, and it was thereby witnessed, that in pursuance of said recited agreement plaintiff *did assign* to the defendant all the said bill of exchange, and

all

all sums of money due thereon, to and for the defendant's own use and benefit; and the defendant covenanted with plaintiff, that within seven days after every dividend which should be declared under the estate of the drawers, acceptors, payees, or indorsers of the said bill thereby assigned, the defendant would pay to plaintiff such sum of money as should be equal in amount to the dividend so to be declared on or in respect of the sum of 692*l.* 11*s.* without any deduction or abatement.

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against
BURT.

The Court now directed *Manning* to confine his attention to the point, whether there was any proof of the averment in the declaration, that the plaintiff had assigned the bill to the defendant. He now argued that there was evidence of an actual assignment of the legal property in the bill to the defendant, although the latter was bound by the terms of his agreement to pay to the plaintiff a sum equal to the amount of the dividends he might have received. Here the covenants in the deed of assignment do not amount to a condition, but are mere collateral and independent covenants.

ABBOTT C. J. The declaration states, that in consideration that the plaintiff would assign to the defendant a bill of exchange, the defendant promised to do a certain act therein mentioned. It is then averred, that the plaintiff did assign the bill to the defendant. It was therefore incumbent on the plaintiff to prove that he did so assign the bill. Now, any lawyer reading that allegation in this declaration would understand that the plaintiff was to assign the bill without any qualification, and for the sole benefit of the assignee. It appears, however, upon the facts stated in the case, that there

was

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against
WHITMORE.

of loading. The ship touched at *Elsinore*, and landed there the goods destined for that place; she afterwards sailed for *Dantzic*, and arrived there on the 15th *December*, 1818, and was delivering the goods destined for *Dantzic*, until the 19th *December*, 1818, when she proceeded to *Pillau* to deliver the remainder of her cargo. On the 21st *December*, 1818, the ship when in sight of *Pillau*, was totally lost by the perils of the sea. The premium mentioned in the policy was returned by the defendant to the plaintiffs before the commencement of the present action.

F. Pollock for the plaintiff, admitted, that it was now settled by the cases of *Rucker v. Allnutt (a)*, *Langhorn v. Allnutt (b)*, and *Hammond v. Reid (c)*, that the liberty to touch at any port or place whatsoever for all purposes, must be taken to mean, for some purpose connected with the voyage. Here, *the object of the voyage was*, that the ship was to proceed from *Hull* to her port of loading in the *Baltic*. But it does not therefore follow, that she was to sail in ballast, and if she was to take goods, she might be permitted to deliver them at those ports, where, by the liberty reserved in the policy, she was permitted to touch and stay.

C. Puller, contra, was stopped by the Court.

ABBOTT C. J. The liberty given by this policy to touch at any ports for all purposes, must be construed to mean purposes connected with the voyage. Here, the voyage was from *Hull* to a loading port in the *Baltic*, and if the ship had gone to *Elsinore* or *Dantzic*

(a) 15 *East*, 278.

(b) 4 *Trent*, 519.

(c) 4 *B. & A.* 73.

to see if she could get a cargo, that would have been a purpose connected with the voyage, and consequently would not have been a deviation. But the vessel, in fact, went to those ports for the purpose of delivering goods, which was wholly unconnected with the object of the voyage insured. I am therefore of opinion, that this was a deviation, and consequently, that there must be judgment of nonsuit.

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SOLLY
against
WHITMORE.

Judgment of nonsuit.

ELLIS *against* ARNISON.

Friday,
October 27th.

DECLARATION stated, that by an indenture, made 10th February, 1804, between the plaintiff of the one part, and the defendant and one *John Campbell* of the other part, the plaintiff demised unto the defendant and the said *John Campbell*, all the small or vicarial tithes and dues of what nature soever, yearly arising in respect of a certain piece or parcel of ground, situate in the parish of *East Moulsey*, in the county of *Surrey*, and all other the tithes belonging to him the plaintiff, as the incumbent of the living of the parish of *East Moulsey*, for and in respect of the said ground and premises. Habendum for 21 years, yielding and paying a yearly rent of 22*l*. Covenant to pay the rent. Breach, non-payment of rent for one year, ending at *Michaelmas*, 1818. Plea, that after making the indenture, and before the commencement of the time for which the alleged rent is supposed to have arisen by an act of the 55 G. 3. for inclosing lands in the parishes of

By an inclosure act it was enacted, that the commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed, unto the inappropriate rectors and curate, in lieu of all great and vicarial tithes; and the commissioners were required to distinguish by their award the several allotments to the inappropriate rectors and curate respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes:

Held, under this act, that the tithes were not extinguished until the commissioners made their award.

East

1821.

ELLIS
against
ARNISON.

East Moulsey and *West Moulsey*, in the county of *Surrey*, reciting, amongst other things, that there were in those parishes several commons and waste lands, and that *Lord Hotham* and *Sir G. H. F. Berkeley* were seised of the rectory impropriate of *East Moulsey*, and as such were entitled to all the rectorial tithes within the parish, and that the provost and fellows of *King's College, Cambridge*, were the patrons of the perpetual curacy of the parish of *East Moulsey*, and that the *Rev. W. Ellis* was the curate thereof, and as such was entitled to all the small tithes within the parish; it was enacted, that *A. B. D.* and *J. D.* should be appointed the commissioners for setting out, dividing, and allotting the commons and waste lands within the parishes of *East* and *West Moulsey*, and for putting the act into execution; and it was also further enacted, that the commissioners should set out, allot, and award unto the impropriate rectors and curate of the parish of *East Moulsey*, in lieu of all great and small tithes arising out of any part of the said commons and waste and other lands in the said parish, thereby intended to be divided, allotted, and inclosed, and for and in lieu of the tithes of all such gardens, orchards, pastures, woodlands, and other ancient inclosures in the parish, as were liable to the payment of tithes; and in lieu of all moduses, and all payments and compositions in lieu of such tithes, such several plots, parcels, and allotments of the said commons or waste or other lands as in the judgment of the commissioners should be in the whole equal in value to one-fifth part of all the land which was then arable, or which had been arable within seven years before the passing of the act; one-tenth part of all the woodlands, and two-seventeenth parts of all the other lands and grounds

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 against
 ARNISON.

grounds within the parish which were liable to the payment of tithes; and the commissioners were required to distinguish and separate by their award the several allotments so to be made by them to the impropriate rectors and curate respectively; and the same allotments were thereby declared to be in full satisfaction and discharge of and for the said tithes and moduses, and all payments and compositions in lieu of tithes, if any, yearly issuing from or out of the said commons, waste, or other lands. The plea then stated, that the premises in the declaration mentioned were within the parish of *East Moulsey*, and were liable to the payment of tithes; and that, after making the said act, and before the 29th September, 1818, to wit, on the 27th September, 1816, the commissioners *did set out and allot unto the impropriate rector and curate of the said parish of East Moulsey*, in lieu of all great and small tithes issuing out of the said commons, and waste and other lands in the said parish of *East Moulsey*, by the said act intended to be divided, allotted, and inclosed, and for and in lieu of the tithes of all such gardens, orchards, pastures, woodlands, and other ancient inclosures in the aforesaid parish, as were liable to the payment of tithes; and in lieu of all moduses, and all payments and compositions in lieu of such tithes, certain plots, parcels, and allotments of the said commons, and waste and other lands, as in the judgment of the commissioners were in the whole of the value mentioned and prescribed in the act, and which allotments were to be in full satisfaction and discharge of and for the said tithes and moduses, and all payments and compositions in lieu of tithes (if any), yearly issuing out of the said commons, waste and other lands. The plea then stated,

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that by means of the premises all the small and vicarial tithes and dues, yearly arising in respect of the said land and premises in the said declaration mentioned, ceased and determined, and were from thenceforth for ever extinguished, and are no longer payable for and in respect of the said ground and premises; and that all the rent up to the time of the extinguishment was paid by the defendant. Replication, after setting out other clauses of the act, stated that the commissioners had made no award. Demurrer and joinder.

D. F. Jones, in support of the demurrer. The question is, whether the tithes have not been extinguished by the allotment made by the commissioners under the act. That depends entirely on the construction of the act. The first part is directory to the commissioners, to set out, allot, and award lands in lieu of tithes: but the act expressly enacts, that the allotments are to be in lieu of tithes. Now the plea shews, that an allotment has been made, and, consequently, that the clergyman has received his compensation for his tithes, which are, therefore, extinguished. It is clear, that the act intended the clergyman to take a benefit before the formal completion of the award, and the fair construction of the act is that the inception of the perpetual curate's advantages under the inclosure, and the extinguishment of the tithes in lieu of which those advantages were given to him, should be cotemporaneous. Under all inclosure acts, certain powers of occupation and of exercise of ownership are given, antecedently to the award to the persons to whom the allotments are made, and a variety of collateral arrangements are to be made before the award can be perfected. The section of the act on
which

which the present question turns, must be taken to be framed with reference to this view of the subject, the first clause of the section is directory that the commissioners shall *set out, allot, and award*; but the subsequent clause, extinguishing the tithes, enacts, that the *allotments* shall be in full satisfaction, and discharge, omitting the repetition of the term "*award*." Therefore, though the commissioners are bound to set out, allot, and award, yet, inasmuch as the setting out and allotting conferred rights on the clergyman before the execution of the award, the extinguishment of tithes was intended to take effect upon the allotment, without waiting for the lapse of time, and the investigation and adjustment of other matters, that were necessarily to precede the formal execution of the instrument by the commissioners.

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ELLIS
against
Alderson.

J. Parke, contra, was stopped by the Court.

BAYLEY J. (a) I am of opinion that the plea cannot be supported. The question is, whether it appears upon the face of the pleadings, that the tithes have been extinguished by what has been done. By this private act, the commissioners are required to set out, allot, and award to the impropriate rectors and curate, in lieu of all great and small tithes, certain plots, parcels, and allotments of the commons, &c.; and they are required to distinguish and separate the several allotments so to be made by them, to the impropriate rectors and curate respectively, and the same allotments are thereby declared to be in full discharge of all tithes. Now, the compensation to the proprietor of the tithes is "the

(a) *Abbott C. J.* was sitting at the *Old Bailey*.

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against
ARMISTON.

same allotments," viz. the allotments set out, allotted, and awarded: that seems to me to be the plain meaning of the act of parliament, and this construction is fortified by adverting to what the general rule of law is upon this point with reference to new inclosures. Now, the freehold in the allotment does not vest in the person to whom the allotment is made before the award is executed; that point was so decided in the case of *Farrer v. Billing*. (a) Now, this plea states only, that the lands had been set out and allotted. It therefore does not shew that the tithe was extinguished, because, for that purpose, the allotments ought to have been awarded as well as allotted and set out. I think, therefore, there must be judgment for the plaintiff.

HOLROYD J. I am entirely of the same opinion. The thing which the act of parliament directs to be in lieu of tithes, is the ground which shall be set out, allotted and awarded by the commissioners. The question is, in this case, whether, by what has been done, the plaintiff has got that which, by the act of parliament, he was to have in lieu of tithes. It appears upon the plea, that a piece of ground has been set out and allotted, but not awarded, and therefore the plaintiff has not got that which was to be in lieu of his tithes. The subsequent part of the clause enacts, that the *same* allotments, (which word, by reference to the preceding words, must be taken to mean, the lands set out, allotted, and awarded,) are to be in full satisfaction and discharge of the tithes. Now the commissioners have made no award, and therefore the plaintiff has not got that which the latter part of the clause directs to

(a) 2 Barn. & Ald. 171.

in full satisfaction of the tithe. I think, therefore, there must be judgment for the plaintiff.

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against
ARMON.

BEST J. It would be a very hard thing on the curate of this parish, that he should be bound to give up his tithe before he has got the equivalent. Now he has not any equivalent till the award be made. After the allotment is made, any party interested in the lands to be allotted, may appeal to the sessions, and the allotments may then be altered before the final award is made. It would be most unjust, therefore, that an allotment, which is not a final adjudication, should be that which the curate is to have in lieu of tithes. I think that the words *same allotments* must be construed with reference to the preceding words, and therefore, that they must mean an allotment confirmed by an award. It does not appear in this case, that any award has been made, and therefore the plaintiff is entitled to our judgment.

Judgment for plaintiff.

GARNETT and Another *against* WILLAN and JONES.

Friday,
October 26th.

THIS was an action on the case, brought by the plaintiffs against the defendants as common carriers, for hire from *London to Worcester*, to recover the

A parcel which, with its contents, exceeded 5*l.* in value, having been delivered to *A.*

and *B.*, common carriers, to be carried by their mail-coach, was accepted by them to be so carried, and was actually put into the mail, and carried by that conveyance a short distance; it was then taken out of the mail-coach by a servant of the carriers, and left to be forwarded by another coach, of which *A.* was one of the proprietors, but in which *B.* had no concern, and the parcel was lost. The carriers had previously given notice that they would not be responsible for any package containing specified articles, or which, with its contents, should exceed 5*l.* in value, if lost or damaged, unless an insurance were paid: Held, that, notwithstanding this notice, the carriers were responsible for the parcel in question, in consequence of their having delivered it to be carried by another coach, of which one of the carriers only was proprietor.

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value

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against
WILLAN.

by the mail. The proprietors in that case were proprietors both of a mail and a heavy coach, going the same road from *Nottingham* to *London*; the parcel was accepted by them to be carried by the mail. It was, however, booked for the heavy coach, and afterwards lost, but it did not appear whether it was lost in a course of conveyance by the coach, or out of the warehouse. It was there held, that the parcel was to be considered as a parcel *lost or damaged* within the meaning of those words in the notice, and that the carrier, therefore, was exempt from responsibility. That case is an authority expressly in point to shew, that the present defendants are not liable.

BAYLEY J. (a) I am of opinion that the plaintiffs are ~~not~~ entitled to recover. A carrier is entitled to have a compensation in proportion to the value of the article entrusted to his care, and the consequent risk which he runs. He may, therefore, by a special notice, limit his responsibility to a reasonable extent. The notice given in this case was, that the carrier would not be answerable for parcels containing certain specified articles, nor for any parcel above the value of 5*l.*, if lost or damaged, unless an insurance were paid. The question then is, what is the fair meaning of the words "lost or damaged." In their largest sense, they would comprehend any case where the goods were lost or damaged by the wilful act of the carrier, or of his servant, even if he threw away the parcel entrusted to his care. For, in that case, it certainly might be said to be lost. It seems to me, however, that that is not the fair and reasonable construction of those words in this notice. Such a construction would certainly be wholly incon-

(a) *Abbott C. J. was at the Old Bailey.*

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 GARNETT
 against
 WILLIAMS.

sistent with several decided cases, to which I shall presently refer. The true construction of the notice seems to me to be this, that the carrier is not to be protected by the words lost or damaged, if he divests himself wilfully of the charge of the parcel entrusted to his care; because, he thereby divests himself of his character of carrier of the thing intrusted to his care. The words lost or damaged ought to be qualified thus: "the carrier himself doing nothing by his own voluntary act, or the act of his servants, to divest himself of the charge of carrying the goods to the ultimate place of destination." It has been said, that the object of this notice was, to exempt the carrier from all responsibility for the acts of his servants. That, however, is not the object expressed in the notice, and it has been held in many cases, that a carrier is responsible for the want of care and diligence of his servants. In *Smith v. Horne* (a), a parcel having been sent from *Worcester* to *London*, arrived in *London*, and was taken from the coach-office of the defendants in a cart, under the direction of one person only, for the purpose of delivery; the servant left the cart unprotected in the street, while he went to different houses for the purpose of delivering other packages, and the parcel, the subject of the action, was lost out of the cart. The Court were of opinion, that the carrier, notwithstanding his notice, was liable, and that the words lost or damaged did not apply to a case of that description. In that case, the carrier, by leaving the cart in the unprotected state which he did, liable to be pillaged by any dishonest person, might be considered to have divested himself of the charge of car-

(a) 2 B. Moore, 18.

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WILLAN.

rying it to its ultimate place of destination, and there, too, the loss accrued from the act of the servant. In *Bodenham v. Bennett* (a), the carrier by his servant had carried the parcel beyond the place of its destination, and it was lost. The Court of Exchequer, after great consideration, were of opinion, that the carrier was not protected by the terms of the notice, upon the principle, that, at the time the loss accrued, the carrier was not carrying it to its place of destination, but, by a wrongful act of his own, had divested himself of the charge of it, on its way to the place of destination. In *Birkett v. Willan* (b), a parcel of indigo was sent by a carrier, directed to a person at *Exeter*, and it was delivered by the book-keeper at the coach-office to a person who applied for it, but who had no right to receive it. In that case, there was a wrongful delivery by the act of the servant. The Lord Chief Justice at the trial was of opinion, that the carrier was protected by the terms of his notice, but the Court, upon a motion for a new trial, and after argument, were of opinion, that that being a case of gross negligence, was a loss not protected by the terms "lost or damaged" in such a notice. Now in that case, the carrier, by a wrongful act of his servant, had divested himself of the charge of carrying the parcel to its ultimate place of destination; for it was his duty to carry it to the house of the person for whom it was intended at *Exeter*, if he found the person to whom it was directed, or to keep it in order to make due inquiry to find him out. These cases are authorities to shew, that the terms lost or damaged in these notices, are to be understood in a limited sense, and it

(a) 4 Price, 31.

(b) 2 B. & A. 356.

seems to me, that the courts have put a sound construction upon those words *lost or damaged*, by which the carrier will receive all the protection which he ought to receive, for he will thereby be exempt from those peculiar liabilities which attach to him only in his character of carrier, but not from the consequence of his own misfeasance, for which every bailee is responsible. In this case, the defendants, *Willan* and *Jones*, received the parcel to be carried by them. Their coach arrives at the *Green Man and Still*, and the parcel is then, by their concurrence, put out of their possession, and delivered to a different person. Now, when the plaintiff sent his parcel by *Willan* and *Jones*, he had a right to have the care and attention of both those persons, and when he had the care and attention of one only, he had not that care and attention for which he originally contracted. *Willan* and *Jones* have therefore, by the act of their servant, divested themselves of the charge of carrying this parcel to its ultimate place of destination, and upon that principle, I am of opinion, that they are not protected by their notice. We have been strongly pressed in argument by the case of *Nicholson v. Willan*. (a) That case, however, is plainly distinguishable from the present. There the defendant was the owner of two coaches, a mail and a heavy coach, going to the same place, and the parcel was delivered for the purpose of being sent by the mail. It was not proved that it was in fact put into either coach, but, by an entry in the defendant's books, it appeared, that he had intended to send it by the heavy coach. The parcel was lost, but whether out of the

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(a) 5 East, 507.

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warehouse, or in the course of conveyance, does not appear. In that case, the carrier had not done any thing to divest himself of that parcel in his character of the proprietor of the mail-coach, and he might afterwards have sent it by the mail, notwithstanding the entry in the book. That case, therefore, cannot govern the decision of the present, and I am therefore of opinion, upon principle as well as authority, that the plaintiffs are entitled to our judgment.

HOLROYD J. I am of opinion, upon principle as well as upon the authority of decided cases, that a carrier, notwithstanding his notice, is responsible for any loss or damage arising in the course of the trust reposed in him, either from his own personal misconduct or that of his servants. The substance of the notice in this case is, that the carrier will not be responsible in certain specified cases, if the goods be *lost or damaged*, unless they are insured. Having given this notice, the defendants receive the parcel in question, to be carried by them by a particular carriage. It is so entered by them in their book, and is taken a part of the way, and is then delivered over by one of their servants to be carried by another conveyance. It must, therefore, be taken to have been delivered over by them with the knowledge that it was to go by the mail from which it was removed, for the way-bill was altered after the parcel had been put into a course to go by that coach. The words "*if lost or damaged*," in my opinion, apply only to a loss or damage arising from any negligence or misconduct in the carriage of the goods. Here the loss arose from a wrongful act of the defendants, wholly inconsistent with the contract they had entered into to carry the parcel, for
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the consequences of which they are answerable. Suppose, after having received the parcel, that, instead of carrying it, they had refused to do so, and wilfully suffered it to remain in their warehouse in town; that would clearly be a breach of the undertaking to carry it to its ultimate place of destination, and would constitute a wrongful act, for the consequences of which the defendants would be responsible. In this case they did take the parcel part of the way, and then removed it into another carriage. The action here is founded upon that misdelivery, and not upon any thing arising in the course of the carriage of the goods which they had undertaken to convey; but for doing an act quite inconsistent with that for which they had stipulated. The delivery of it over to another coach, when they had undertaken to carry it by their own coach, was a wrongful act on their part, which makes them responsible for the consequences arising from that misdelivery. Besides the cases already referred to by my Brother *Bayley*, the case of *Beck v. Evans* (a) is a strong authority to shew, that a carrier, notwithstanding these notices, is responsible for the negligence of his servant. There the carrier received a cask of brandy, which leaked in the course of the journey; the waggoner was informed of it, but took no step to prevent the leakage, and a considerable quantity of the brandy was lost; and it was held that the carrier, notwithstanding his notice, was responsible, on the ground that the loss accrued from the gross negligence of the servant. So, too, in *Ellis v. Turner* (b), the goods were sent by water to be carried to *Stockwith*, and they were carried beyond the place,

(a) 16 *East*, 247.(b) 3 *T. R.* 531.

and

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and the vessel was afterwards lost; the Court held, that the carriers, notwithstanding the notice, were responsible; and in that case the loss happened, not from the miscarriage of the goods, but from carrying them beyond the place at which they had undertaken to deliver them. As to *Nicholson v. Willan*, it is perfectly consistent with the circumstances stated in that case, that the parcel may have been lost out of the warehouse, or even that it may have been sent by the mail; and Lord *Ellenborough*, in delivering the judgment of the Court in that case, expressly states, "that the mere fact of the booking of the goods for a different coach, and a subsequent non-delivery, could amount to no more than a negligent discharge of their duty in their character of carriers, and not to an entire renunciation of that character, and of the duties attached to it, so as to make them guilty of a distinct tortious misfeasance in respect of the goods in question." In the present case, there was a renunciation of that character; for the putting of the parcel into another carriage, when they knew that it was to go by their own, and when they had in fact carried it part of the way, was an act done in direct contravention of the undertaking which they had entered into; and therefore was a wrongful renunciation of their character of carriers; for all the consequences of which they are, in my opinion, responsible. In the case of *Bodenham v. Bennett (a)*, Mr. Baron *Wood*, speaking of these notices, said, "These special conditions were introduced for the purpose of protecting carriers from extraordinary events; but they were not meant to protect them from due and ordinary care; be-

(a) 4 Price, 34.

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 against
 WILLAN.

sides, this case does not come within the terms of the notice; for here the box was not lost or damaged, but it was mis-delivered." Now, in this case the loss arose both from the want of due and ordinary care, and from doing an act in contravention of their duty and undertaking; and besides, in this case, too, the parcel was mis-delivered, by having been delivered to another carrier. Upon these grounds, and upon the authority of the cases to which I have referred, I am of opinion that the defendants are responsible for the value of the property lost in consequence of the wrongful act of their servants, who delivered it over to another carrier to be carried by his coach, instead of that of the defendants.

BEST J. Admitting that there is a distinction between negligence and misfeasance, I think that the plaintiffs are clearly entitled to recover; because it appears to me that this is a case of misfeasance. Upon the other point I have lately said so much, that it will be only necessary for me to say, that nothing which has since occurred has induced me to alter my opinion. (a) I cannot see, with reference to the question of the responsibility of the carrier, that there is any sound distinction between negligence and misfeasance. I am of opinion, that by the common law a carrier is answerable for the negligence, as well as the misfeasance of his servants. The case of *Nicholson v. Willan*, which has been strongly pressed in argument, for the reasons already stated, is not an authority in favour of the defendant; but if it were, I think that the authority of that case is considerably shaken by the case of *Birkett v. Willan*, where the decision of the Court proceeded ex-

(a) *Batson v. Donovan*, 4 Barn. & Ald. 21.

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against
WILLIAM.

pressly on the ground that the carrier was liable for gross negligence. I am of opinion, that by these notices the carrier is only protected from that responsibility which belongs to him as insurer; that is a principle which all mankind can understand; and I think that we ought, in such cases as these, to lay down rules which may be easily comprehended by the great body of the public. For the reasons already given, I am of opinion that the plaintiff is entitled to recover.

Judgment for Plaintiff.

Friday,
October 26th.

DOE, on the joint and several Demises of JOHN ANNANDALE, DAVID ANNANDALE and JAMES ANNANDALE, and THOMAS DEWELL and FRANCES, his Wife, - - - Plaintiffs;

against

CHARLES BRAZIER, - - - Defendant.

A testator, by his will, bequeathed the rents of one dwelling-house situate in A. to C. B. for his life; and from and after the decease of the

said C. B. he bequeathed the same rents, together with the rents of all his other houses and lands, unto his nephews and niece therein mentioned, for their lives and the life of the survivor; and after the decease of the survivor of them, he gave and devised all his houses and lands to trustees, in trust to sell the same, and to pay the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor; and then devised all the residue of his estate to C. B. : Held, that upon the death of the testator, the nephews and niece took an immediate estate, for their lives and the life of the survivor, in the rents of all the houses and lands, except the house specifically bequeathed to C. B. for his life.

THIS cause was tried before Abbott C. J., at the *Middlesex* sittings after *Trinity* term, 1820, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the construction of the following will: "I, *James Priest*, of, &c. make this my last will

and

and testament: I give and bequeath unto my son-in-law, *Charles Brazier*, the rents, issues, and profits of my messuage, tenement, or dwelling-house, situate in *New Brentford*, in the county of *Middlesex*, for the term of his natural life; and from and after the decease of the said *Charles Brazier*, I give and bequeath the same rents, issues, and profits, together with the rents, issues, and profits of all other my messuages or tenements, lands, hereditaments, and premises, situate, and being in *New Brentford* aforesaid, unto my three nephews, *John Annandale*, *James Annandale*, and *David Annandale*, and my niece, *Frances Annandale*, for their respective natural lives, and the life of the longest liver of them, share and share alike, and from, and immediately after the decease of the survivor of them, my said nephews and niece, I give and devise all, and singular, my said messuages or tenements, lands, hereditaments, and premises, unto *Christopher Pcel* and *George Clark*, their heirs and assigns, for ever, upon trust, to sell the same premises, and to pay over the produce of such sale unto such of the children of my nephews and nieces as shall be living at the time of the decease of the survivor of them. I give and bequeath unto the said *Charles Brazier* 100*l.* stock in the four per cent. consols, for his own use and benefit, and I give and bequeath unto him, the said *Charles Brazier*, all my household goods, plate, linen, china, and all other my estate and effects whatsoever and wheresoever. To hold the same unto the said *Charles Brazier*, his heirs, executors, administrators, and assigns for ever. The premises for which this ejectment was brought, were the messuages, tenements, lands, hereditaments, and premises mentioned in the testator's will,

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BRAZIER.

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situate

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ANNANDALE
against
BRAZIER.

situate and being in *New Brentford*, (save and except the house mentioned as then in the occupation of *R. Tunstall*,) and expressly devised to the said *Charles Brazier* for the term of his life, and of which the testator died seized. The defendant, *Charles Brazier*, is the son-in-law of the testator, and the residuary legatee and devisee mentioned in his will, and was at the time the ejectment was brought, and still is, in possession of the premises sought thereby to be recovered. The lessors of the plaintiff (the *Annandales*,) were the surviving nephews of the testator, and legatees mentioned in the above will. *Thomas Dewell*, the other lessor, intermarried with the niece. The lessors of the plaintiff were not the heirs at law of the testator.

The question for the opinion of the Court was, whether the lessors of the plaintiff were entitled under the will to the premises belonging to the testator, situate in *New Brentford*, during the life of the defendant.

Treslove was to have argued on the part of the plaintiffs, but the Court called upon

Chitty, contra. No interest passed to the nephews and niece of the testator by this will, until after the death of *Brazier*. The testator, after giving one house for life to the defendant, proceeds, "and from and after the decease of *C. Brazier*, I give and bequeath the same rents, &c. together with the rents, &c. of my other houses, to my nephews and niece." Now it is perfectly clear, that the latter could take no interest in the one house bequeathed expressly to the defendant, until after his death, and the words, together with, cannot be rejected from the will, and if they be allowed to stand, then

then they refer not merely to the bequest, but to the time when the bequest is to take effect. The will operates therefore as a specific devise of specific property, to take effect only upon the death of *Brazier*. That being so, and as the trustees named in the will took no estate until after the decease of the survivor of the nephews and niece, the life interest in all the testator's houses in *New Brentford*, passed to the defendant under the residuary clause in the will.

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DOX DON.
ANWARD
AGING
Brazier.

BAYLEY J. (a) We have no right to make a will for a party, but it is our duty to look to the whole of the will, and to extract from it what, on the fair construction of the will, appears to have been the intention of the testator. And of the intention of the testator, in this instance, I have no doubt. It seems to me, that his object was to give one house to *Charles Brazier*, and to give the reversion of that, and the immediate possession of all his other houses, to his nephews and niece for their respective lives. If the words, "and from and after the decease of the said *Charles Brazier*," be confined in construction to what had before been given to *Charles Brazier* for life, then there is no difficulty in the construction of the will. The proper way of reading it is this, "I give to my son-in-law, *Charles Brazier*, that house, and after his decease, I give and bequeath the rents, issues, and profits of that house to my three nephews and niece, together with the rents, issues, and profits of my other houses," applying the words "together with" as a repetition of the words of gift and bequest; not meaning to postpone the interest in the other houses till after the decease of *Brazier*, but giving to him the immediate interest in

(a) *Abbott C. J.* was sitting at the *Old Bailey*.

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Doe dem.
ANNANDALE
against
BRAZIER.

that house. It might happen in the course of events, according to the construction contended for, that every one of these persons might be disappointed, because, if *Charles Brazier* survived them, they would take (according to that construction) no interest at all in any of the houses, and their children even would take no interest until *Brazier* died; nor until that event happened, would the trustees be entitled to sell. Whereas they are directed to sell immediately after the death of the survivor of the nephews and piece. Such a construction, therefore, seems to be at variance with the provisions of this will. The case of *Cooke v. Gerard* (a) is an authority in point. In that case, the testator had two estates, one in possession, and another in reversion expectant on the death of *A. B.* He devised the former to his widow for one year, and then he devised both to the lessors of the plaintiff, to hold immediately after the expiration of the year from his decease, and the decease of *A. B.* Therefore, the lessor of the plaintiff was, according to the words, to hold from, and immediately after the expiration of one year after the death of the testator, and the decease of *A. B.* The question was, whether the whole was postponed until after *A. B.* died. The Court decided not, but that the words were to be taken distributively, and that "after the decease of *A. B.*," was only to be applied to that estate in which *A. B.* had an interest. And so in this case, these words, "after the decease of *Charles Brazier*," may fairly be confined to that house, the rents, issues, and profits of which had previously been given to *Charles Brazier* for his life; but as to the residue, it is a present and immediate devise.

(a) 1 Saund. 181.

HOLROYD J. I think that we should defeat the manifest intention of the testator, if we were to decide this case in favour of the defendant. It seems to me, that at the very time when the testator was devising one house to *C. Brazier*, he had in his mind his other real property. For, immediately after giving the life estate in the one house to the defendant, he goes on and says, and from, and immediately after the decease of the said *C. Brazier*, I give the said rents, issues, and profits, together with the rents, issues, and profits of my other houses, to my nephews and niece. It is clear, that the testator meant *Brazier* to take a life estate in one house only, and yet that he meant in this part of the will to dispose of his property in the other houses. Now, that intention of the testator cannot be effected without giving an immediate interest in the latter to his nephews and niece. It is said that the words "together with" incorporate not only the gift, but the time when that gift was to take effect. I think, however, that it was the manifest intention of the testator in this case, that these words should apply only to the gift, and not to the time when that gift was to take effect. I think it quite clear, therefore, that the testator in this part of his will intended to give an immediate estate for the lives of his nephews and niece, and the life of the survivor, and therefore, that there should be judgment for the plaintiff.

BEST J. I am of the same opinion. It is evident that the testator did not intend, that the defendant, to whom he had expressly devised one house, should take an immediate interest in the other houses, and it is equally clear, that he did not intend these houses to

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Don't dem.
ANNANDALE
against
BRAZIER.

1821.

Pro. dem.
ANNANDALE
against
BRASIER.

go to his heirs at law, for he has, by the residuary clause, given away all his estates whatever. Then if he intended, that these houses should not go to the defendant or his heirs at law, it is quite clear, that he must have intended, that they should immediately upon his death go to his nephews and niece. It has been said, that the words "together with" must necessarily refer to the time when the gift is to take effect. Looking, however, to the whole context of this will, I think that we shall best attain the intention of the testator by construing those words to refer to the property bequeathed, and not to the time when the bequest is to take effect. I think, therefore, that there must be judgment for the plaintiff.

Judgment for the plaintiff.

Friday,
October 26th.

CAZENOVE and Another, Assignees of POWER
and WARWICK, Bankrupts, against PREVOST
and Others.

A., a foreign
merchant, pur-
chased in his
own name, but
on account and
with the money

ASSUMPSIT by the plaintiffs, as assignees of the
estate and effects of *J. Power* and *R. Warwick*, of
London, merchants, against the defendants, who were

of *B.*, a *British* merchant, certain bank shares in the *French* funds. The latter drew bills upon *A.*, which he accepted, on the security of those shares standing in his name; and these bills were assigned by *B.*, for a valuable consideration, to *C.*, a *British* subject. Before they became due, *B.* authorised *A.* by letter to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived, *A.* had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; *B.*, also, afterwards became bankrupt. *C.*, by process in the foreign country, attached the bank shares still standing in the name of *A.* for the debts due to him upon the bills; and the court there decreed that the bank shares should be sold, and that the proceeds should be applied, first, to pay a debt due from *B.* to *A.*, and afterwards to retire the bills. Under this decree, *C.* received a certain sum of money on account of the bills: Held, that the assignees of *A.* could not recover back this money as money belonging to *B.*

mer-

merchants, also resident in *London*, to recover from them 194*l.*, as money had and received by them, to the use of the plaintiffs, as such assignees. Plea, general issue. The cause was tried at the *Middlesex* sittings, before *Abbott C. J.*, when a verdict was found for the plaintiffs, subject to the opinion of the Court, on the following case.

In *June*, 1818, *Martin de Puech* and Co., of *Paris*, by the directions of the bankrupts, purchased in their own names, but on the bankrupts' account, 25 bank shares in the *French* funds, and at the same time drew two bills of exchange upon the bankrupts, for the price of such shares, which the bankrupts duly accepted and paid. On the 2d *October*, 1818, the bankrupts drew upon *Martin de Puech* and Co. three bills of exchange, amounting together to 40,000 francs, payable three months after date, which the defendants purchased of the bankrupts, and gave them the value for in money, amounting to 161*l.* 3*s.* 3*d.*, which bills *Martin de Puech* and Co. accepted, upon the security of such bank shares, which were then standing in their names, and which were the only funds in their hands belonging to the bankrupts. On the day the bankrupts drew these bills upon *Martin de Puech* and Co., they wrote them a letter, advising that they had drawn the bills, and stating, that in case the bank shares should not ultimately produce the sum for which the bills were drawn, they would be responsible to them for the deficiency; and on the 1st of *January*, 1819, the bankrupts, by another letter, authorised *Martin de Puech* and Co. to sell the twenty-five bank shares, in order to enable them to reimburse themselves what they had to pay in respect of the bills. On the 31st *December*, 1818 (two days be-

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—
CARRON
against
PUECH.

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—
 CASENOVE
 against
 PREVOST.

fore the bills became due) *Martin de Puech and Co.* stopped payment, the bank shares then remaining in their names, and the bills were all dishonoured by them, and also by the bankrupts. At the time the Defendants took these bills of exchange of the bankrupts, they did not know that *Martin de Puech and Co.* had the twenty-five bank shares standing in their names belonging to the bankrupts, nor were they informed thereof, until *Martin de Puech and Co.* had suspended their payments. A commission of bankrupt issued against *Power and Warwick* on the 13th of *January*, 1819, and an assignment of their estate and effects was duly made to the plaintiffs on the 2d *February*, 1819. The defendant, *Prevost*, being then at *Paris*; on the 2d *March*, 1819, issued process of attachment, according to the laws of *France*, against the twenty-five bank shares in the hands of *Martin de Puech and Co.*, under which attachment one of the plaintiffs, *Fermin de Tastet*, who was then in *Paris*, on the 27th of *May*, 1819, was duly summoned, but did not appear, and the other plaintiff, *Cazenove*, being in *London*, on the 9th of *July*, 1819, received notice of the proceeding at *Paris*, but never interfered therein. Upon the hearing of the attachment, on the 12th *August*, 1819, the Court decreed, that the bank shares should be sold, and the net proceeds applied, so far as they would extend, to pay a balance of 1570 francs, due by the bankrupts to *Martin de Puech and Co.*, and after payment thereof, to retire the bills so accepted by *Martin de Puech and Co.* in favour of the bankrupts. The sum of 1346*l.* was in consequence received by the defendants, on the 30th *December*, 1819, as the produce of the bank shares, after deducting from such produce the 1570 francs, and the costs of the proceedings under the attachment,

ment, and there was still due to the defendants a further balance, in respect of the three bills of exchange, which they claimed to prove under the commission issued against *Power* and Co. *Martin de Puech* and Co. settled with all their creditors, and paid them the sum of 4s. in the pound, on the amount of their respective debts, in discharge thereof, which the defendants have accepted of *Martin de Puech* and Co., in respect of other demands they had on them, but they were not admitted creditors on their estate for these three bills of exchange.

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against
PREVOST.

Platt, for the plaintiff. The assignees are entitled to recover this sum of money as money belonging to the bankrupt, of which the defendants have obtained possession since the act of bankruptcy. The legal interest in the bank shares was vested in the bankrupts. When, therefore, they were converted into money, their produce was money had and received to the use of the assignees. If the question had been between *Martin de Puech* and Co. and the plaintiffs, it might be urged that the produce was subject to the same lien as the bank shares; but even in that case, the lien could only attach upon payment of the bills by the *French* house. Admitting, however, that the lien would have been available between those parties, still it is not competent for the defendant to take advantage of it; for a lien is a personal, and not a transferable right. The *French* house could not avail themselves of the lien, as they had not paid the bills; and even if they could, as between them and the plaintiffs, still they could not transfer their rights to the defendant. By the stat. 1 Jac. 1. c. 15. s. 13., power is given to the commissioners to assign all debt

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CASENOVE
against
PALVOST.

debts due to the bankrupts for the benefit of the creditors, and then it enacts, "neither shall the *same* be attached as the debt of the bankrupt." Now, here the bank shares have been attached as the debt of the bankrupt; and that is against the express provisions of the statute. This is not like the case of a fund appropriated to particular purposes at the time of accepting the bills; for in such a case a power is given by the owner to the appropriating party, and unless that power is strictly complied with, the owner is not bound by the appropriation. In this case, the proceeds were applied, first, to liquidate the general balance due to the *French* house, which was not within the scope of the trust reposed in them. Here, therefore, one creditor has obtained an undue advantage over the others, by attaching the debt due to the bankrupts, which is against the policy and provisions of the bankrupt laws.

Tindal, contra, was stopped by the Court.

BAYLEY J. (a) This case has been argued very forcibly on the part of the assignees. There is no difficulty, however, as to the principle of law applicable to the case. The assignees are unquestionably entitled to all the property that belonged to the bankrupt at the time of his act of bankruptcy: and there can be no doubt, also, that if a subject of this country, by means of legal process abroad, gets into his hands, after the bankruptcy, money belonging to the bankrupt, he is liable to refund it to the assignees. The question in this case is, whether the property in question was, at the time of the bankruptcy, the property of the bankrupts.

(a) *Abbott C. J. was sitting at the Old Bailey.*

Before

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 CASEROVE
 against
 PREVOST.

Before the bankruptcy, *Martin de Puech* and Co. had standing in their names in the *French* funds 25 bank shares belonging to the bankrupts. On the faith of those bank shares, the bankrupts were allowed to draw on the *French* house, and the latter accepted the bills; the legal consequence of which was, that it entitled them to keep those shares as a security against the liability they had incurred by their acceptances. On the 1st of *January*, 1819, the bankrupts authorize the *French* house to sell the shares. So that, at the time of the act of bankruptcy of *Power* and *Warwick*, the *French* house was under acceptances for the bankrupts, with certain bank shares in their names, which they had the power to sell. Under these circumstances, *Prevost*, one of the defendants, the holder of the bills, on the 12th *August*, 1819, instituted a suit in the *French* court, in the course of which process of attachment issued against these 25 bank shares. At that time the bank shares stood in the name of *Martin de Puech* and Co., and they had a right to sell them, and apply the proceeds in discharge of their acceptances. The bankrupts could not call on the *French* house to give up any part of that money until they had released them from all liability in respect of those acceptances. The *French* Court made a decree, that the bank shares should be sold, and that the proceeds should be applied, first, in payment of the general balance due from the bankrupts to *Martin de Puech* and Co., and that the residue should be specifically applied (not as the money of the bankrupts) to retire the bills, and it was so applied accordingly. At the time when the bank shares were standing in the names of *Martin de Puech* and Co, the bank might be considered as a stake-holder, the two houses having an interest

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against
PARVOST.

interest in the money. *Martin de Puech* and Co. had an interest that it might be applied in discharge of their acceptances. The house of *Power* and *Warwick* had a similar interest, in order that they might be relieved from their liability as drawers, and they had also an interest in any surplus. The *French* Court decreed, that the proceeds should be applied so as to have the effect of relieving the house of *Martin de Puech* and Co. pro tanto from their liability as acceptors, and that of the bankrupts from their liability as drawers. The question, then, is, to whom the money belonged which they directed to be so applied. It seems to me, that it was the joint money of *Martin de Puech* and Co. and the bankrupts, neither of those houses individually having any control over it in conscience or justice. The money was applied in the manner decreed by the *French* Court; and, therefore, had the effect of relieving *Martin de Puech* and Co. from their obligation as acceptors to the extent of the payment. If they had understood that, by the *English* law, this money would be considered as the money of *Power* and *Warwick*, they might, for their own protection, have insisted that it should be paid into their own hands, in order that they might themselves pay it over to the defendants, and thereby exonerate themselves from all responsibility. They might then have paid it as their own money, and the assignees could have had no claims against the defendants for receiving it. Now, it seems to me, that the payment under the decree of the *French* Court was, to all intents and purposes, the same thing as if it had been made by the hands of *Martin de Puech* and Co.. If it was not, the legal consequence would be, that the defendants would be liable to refund the money

money to the assignees, and *Power* and *Warwick* would then have the whole benefit of the money which had been standing in the bank for the security of *Martin de Puech* and Co., and the latter would be liable on their acceptances. That would be most unjust. I am of opinion, that by our law the assignees are not entitled to claim this money ; because, when it was paid to the defendants, it was not the money of the bankrupts, *Martin de Puech* and Co. having an interest in having it applied in discharge of the bills which they had accepted. It is, therefore, to be considered in substance as if it had been paid by them : and, if so, the assignees have no claim. I think, therefore, that there must be judgment for the defendants.

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CAZENOVE
against
PREVOST.

HOLROYD J. Notwithstanding the able argument addressed to the Court on the part of the plaintiffs, no doubt has been raised in my mind with regard to the point in question. I take it to be quite clear that the plaintiffs, as assignees, cannot recover the money now sued for, unless the bankrupts themselves, in case there had been no bankruptcy, could have recovered it as money had and received by the defendants to their use. Now, I am of opinion, if there had been no bankruptcy, that the bankrupts could not have maintained an action against the defendants for money had and received to their use on the ground of this being money to which they, the bankrupts, were entitled. The bills were accepted on the faith of those bank shares in the *French* funds, which were bought by *Martin de Puech* and Co. They had more than a simple lien on it ; it was in law their property, and vested in them ; in trust, indeed, for the bankrupts, after satisfying their

OWN

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own lien. Where a person has a simple lien on goods, he cannot sell and dispose of them; but if he has a special property in those goods, in trust for another, subject to a claim of his own, in such case the party may sell, in order to repay himself. The bills having been accepted, *Martin de Puech* and Co. were, in the first instance, liable to pay them. If they had paid them, they would have had a right to have sold the shares to reimburse themselves. An attachment was lodged in the *French* court, and *Martin de Puech* and Co. were parties to it, for a decree is made in their favour, as to that part of the property appropriated to pay them, previous to any application of any part of it to the payment of these bills. Suppose there had been no bankruptcy, would the bankrupt have been entitled to any of the proceeds of those shares in the *French* funds, while the bills were outstanding? I think not. *Martin de Puech* and Co. had the legal property in them, for they were the only persons who could sell or dispose of that property. If the bills, indeed, had been paid by the bankrupts, they would have had an equitable interest in the bank shares. But if *Martin de Puech* and Co. had sold the shares, the bankrupts could not have got the money out of their hands until they had reimbursed them to the amount of their acceptances. Nor can they, now that *Martin de Puech* and Co. have been compelled by the decree of the *French* Court to pay the money to the holders of the bills, recover the same from the defendants; because it was not their money until the bills had been provided for; that not having been done, I am of opinion, that they had neither the legal nor equitable property in the proceeds. It is said, however, that by the statute of *James*, the property cannot be attached

as the debt of the bankrupt. If the bankrupts had been the only debtors, and the property had been attached, that would have come within the statute; but here the property that is attached was in law, though a trust, in some respects the property of *Martin de Puech* and Co. They were debtors as well as the bankrupts. For they were indebted as acceptors to the holders of the bill; and it is for the satisfaction of that debt, due on the bills, and not the debt of the bankrupt merely, that this property is attached. I think that the bank shares might be attached as the debt of *Martin de Puech* and Co., and the decree being that the proceeds should be applied towards the retiring of those bills, it is to be considered exactly the same as if the Court had ordered the money to be paid to *Martin de Puech* and Co., that they might pay those bills, and they had so paid them in compliance with that order. At all events, I think that the assignees cannot say that this is their money till they themselves have paid these bills. For these reasons, I think that there ought to be judgment for the defendant.

1821.

CASENOTE
against
FARRER.

BEST J. This case has been argued, not only with great ingenuity, but put on its only tenable ground. It must be considered, as if both *Power* and *Warwick* and *Martin de Puech* and Co. were solvent, and then it would stand thus: *Power* and *Warwick* draw on *Martin de Puech* and Co. in *France*, certain bills of exchange, and the latter accept those bills, on the express condition that they are to hold certain bank shares which stood in their names; so that, in *France*, they were the actual legal proprietors of the shares, and they were to retain them, in satisfaction of the debt to which they rendered themselves liable by their acceptances.

Now

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CASENOVE
against
PARVOST.

Now these bills, so drawn, get into the hands of the defendants, who present them to *Martin de Puech and Co.* in *Paris*. Suppose the latter had not become insolvent, and the defendants had proceeded to get these bank shares by attachment, out of the hands of *Martin de Puech and Co.*, the answer would be this: "You cannot attach this property, it is not the absolute property of the drawers, but it is our property; it is in our possession, it is clothed with certain rights which belong to us; until those claims are satisfied, you cannot take it out of our hands." And in a court of law it could not have been taken out of their hands. It would be necessary, in this country, to have gone into a court of equity to have ascertained those rights. The *French Court* has disposed of it as a court of equity would have disposed of it in this country. On the defendants in this action attaching the property in *France*, the Court calls on all the parties interested, as a court of equity would do. They give notice to Mr. *De Tastet* and the assignees of the bankrupt, with a view of bringing all the parties concerned before the Court. If they did not choose to appear before the Court, it is not the fault of the Judges. When the case comes before them, how do they dispose of it? Why, possessing legal and equitable jurisdiction, they decide that this property is not the absolute property of the drawers of the bills in *England*, but is property in which they had little interest, being mortgaged to *French* subjects to the extent of its value; and, indeed, on the sale of the property, it does not produce enough to pay the *French* mortgagees, the latter having rendered themselves responsible to the defendants in this action, by the acceptance of those bills of exchange. The Court directs, therefore, that

that the proceeds should be disposed of in first protecting *Martin de Puech* and Co., in retiring the bills; that is, they did the same thing as if they had directed the money to be paid over to the *French* houses, in order that they might hand it over to the holders. That was a just and equitable decision, and such as a court of equity would have pronounced in this country. Then, this money has been paid by *Martin de Puech* and Co. and not by the bankrupts. It cannot be considered in the hands of the defendants as money which has been received on account of the bankrupts, but as money received on account of *Martin de Puech* and Co.; and the defendants have received it, on condition of giving up their claim against *Martin de Puech* and Co. The whole fallacy of the argument consists in considering this as the money of the bankrupts; whereas, as between them and *Martin de Puech* and Co., it was clearly the money of the latter; for the shares were purchased in their own names, and they were suffered to continue in possession of them, so as to enable them to protect themselves against the legal consequences of their acceptances. Upon these grounds, I am opinion that there ought to be judgment of nonsuit.

Judgment of nonsuit.

CLARIDGE *against* EVELYN and Others.

Saturday,
October 27th.

THIS was an action upon the case, brought by the plaintiff against the defendants, as commissioners of a Court of Requests, established by an act of the

An infant cannot be appointed to the office of clerk of a Court of Requests,

where it is part of the duty of that officer to receive the money of the suitors.

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CLARIDGE
against
EVELYN.

48 G. 3., for a false return to a writ of mandamus. The declaration stated that the plaintiff had been duly elected to the office of clerk of the said Court of Requests, but had been unjustly refused admittance to the office by the defendants, the commissioners of the Court; that the plaintiff had obtained and prosecuted a writ of mandamus, directed to the commissioners, commanding them that they should admit the plaintiff into the office of clerk, or that they should shew cause to the contrary, which writ had been duly delivered to the defendants; yet that the commissioners had not admitted the plaintiff to the office, but had falsely and maliciously returned, in answer to the said writ, "that the office of the clerk of the commissioners of the Court of Requests aforesaid having become vacant by the death of one *Richard Crow*, then late clerk, *T. K. Crow* was duly elected clerk of the said Court by the major part of the commissioners, and had been since duly admitted into the office; and that the plaintiff never was elected to the office of clerk of the Court of Requests, as by the writ was suggested." The declaration, after negating the facts in the return, stated that the plaintiff, by reason of the false return, had been deprived of the gains and profits which he would have derived by exercise of the office, to his damage of 500*l.* Plea, general issue. At the trial before *Abbott C. J.*, at the *Guildhall* sittings after *Michaelmas* term, 1819, the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case.

By the death of the late *Richard Crow*, on the 8th of *December*, 1818, the office of clerk of the Court of Requests, constituted by the act of parliament mentioned in the declaration, became vacant. On the 8th day

1821.

 CLARIDGE
 against
 ELLIN.

day of January, 1819, the commissioners of the Court, at a meeting duly summoned and held according to the directions of the act, proceeded to the election of a clerk in the room of Crow. The plaintiff, and one T. K. Crow, were the candidates for the office. After the commissioners were assembled, and immediately before the election commenced, T. K. Crow, in the hearing of the commissioners, was asked his age by Richard Allmett, which question he declined answering: and thereupon Richard Allmett, one of the acting commissioners, notified to the rest that T. K. Crow was an infant under the age of 21 years, and on that account ineligible to the office of clerk; and that if any commissioner should, after that, give his vote for the said T. K. Crow, such vote would be thrown away and void. At the election, each of the commissioners, as he came up to vote, was separately asked by the said Richard Allmett for whom he voted; and the said Richard Allmett, in the hearing of each of the commissioners, publicly protested against each of the votes for the said T. K. Crow immediately on its being tendered, and before the same was taken down or recorded, on the ground of the deficiency of the said T. K. Crow. At the close of the poll, the numbers were, for T. K. Crow, 87; G. Claridge, 44; T. K. Crow was, therefore, immediately after the election, declared by the commissioners to be elected by them as such clerk, and was returned as such clerk, and admitted to the office, and has hitherto continued to serve and act as clerk. T. K. Crow, at the time of the election, was an infant under the age of 21 years, and, at that time, under articles of clerkship to Richard Crow, having attained the age of 20 on the 26th day of

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CLARIDGE
against
EVELYN.

December, 1818; but he had, for about two years, occasionally acted for *Richard Crow* in his office of clerk of the Court of Requests, but without any appointment pursuant to the provisions of the act of parliament. The question for the opinion of the Court was, whether the said *T. K. Crow* was duly elected to the said office.

Tindal, for the plaintiff. If an infant be not eligible to this office, due notice having been given to the electors at the time of the election, the votes so given to that infant were thrown away. Whether an infant be eligible to the office in question, must depend upon the duties imposed upon the officer by law. Now, by the 48 G. 3. c. 50., by which this court was established, the commissioners are authorised to appoint one or more fit persons for each of the offices of clerk and beadle; and the person appointed is authorised to execute the office of clerk, immediately after his or their appointment, and from time to time to appoint a deputy or deputies, to act in his or their names or stead, in case of sickness, or other sufficient cause to be allowed by the commissioners, but not otherwise. By a subsequent clause, p. 17., the clerk is directed, at the prayer of the party prosecuting, to issue a precept, by way of *ca. sa.* or *fi. fa.*; and in p. 20., the clerk is directed to indorse the sum of money and costs, to be levied on the precept, to be issued upon execution awarded against the body or goods of any person; and if the party against whom such execution shall be awarded, shall, before any actual sale of the goods or his imprisonment, pay unto the clerk for the time being such sum of money and costs, then the execution shall be superseded, and the body,
goods,

goods, and chattels of the party set at large; and in p. 23., amongst the fees which the clerk is entitled to take, is one for paying money into court in full, and entering the same in his book. It appears, therefore, to be part of the duty of the clerk to receive the money of the suitors, for whom he is a mere trustee, and to whom he ought to be responsible. An infant, however, would not be liable in an action for money had and received. In *Co. Litt.* 172. a., it is expressly laid down, that an infant cannot be receiver, for he has no skill to render an account. An infant, indeed, cannot contract, except for necessities; and therefore, in *Whywall v. Champion* (a), it was held, that if an infant be a mercer, and buy goods and wares for his shop, the contract is not binding upon him. Besides, this was an office which required skill and ability, and on that ground it has been decided, that an infant cannot be a mayor of a corporation, nor elected a burgess (b); *Rex v. White*. (c) The circumstance of the clerk being allowed by this act of parliament to appoint a deputy, with the approbation of the commissioners, can make no difference, for no action is given against the deputy, and therefore the rule of respondeat superior, applies; and the right of action would only be against the clerk.

Chitty, contra. An infant may contract for his own benefit, and, by analogy, he ought to be entitled to hold an office which is for his benefit; and in *Bristow v. Eastman* (d) it was held, by Lord *Kenyon*, that money had and received would lie against an infant for money em-

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CLARIDGE
against
EVELYN.(a) *Str.* 1083.(b) *Comyn's Digest*, tit. *Infant*, C. 1.(c) *Schwyn*, N. P. 9th edit. 1043. *Mandamus*.(d) *Peake*, N. P. C. 223.

1831.

CLERGY
against
Eccles.

bezzled by him. In *Young v. Fowler (a)*, it was held, that a grant by the bishop of the office of register of a diocese in reversion after the death of the tenant for life, to an infant eleven years of age, exercendum per se vel deputatum sufficientem, is good, notwithstanding the infancy. Now here this office may be exercised by deputy, and therefore that case is in point,

ABBOTT C. J. No authority has been cited to shew that the grant of an office of public and pecuniary trust to an infant is valid. It is true, that the offices of sheriff and of jailor have been granted in fee, and that such grants are not void, on the ground that those offices may by descent vest in an infant. In those cases, however, the grantees have the power of appointing deputies. In the case of *Young v. Fowler*, where a grant by the bishop of the office of register of a diocese to an infant was held good, the grant was in reversion, and the grantee attained full age before the office descended to him. Besides, the duties of that office are not stated in the report of the case. Looking at this act of parliament, it appears that this is an office of pecuniary trust, and it seems to me, therefore, impossible to allow the grant of such an office to an infant, for in the event of his being guilty of negligence, with respect to the monies placed in his hands, the suitors of the court might be deprived of that remedy which they ought to have against a public officer entrusted with their money. If, on the other hand, he were to conduct himself so as to be criminally liable, he would be placed in a situation of peril, which the law is anxious he should avoid. I am of opinion, therefore, that he was ineligible to this office ; and due notice of his incapacity having

(a) Cro. Car. 555.

been given to the electors at the time of their election, their votes were thrown away, and, consequently, there must be judgment for the plaintiff.

1821.

CLARIDGE
against
BRYLYN.

BAYLEY J. I am of the same opinion. The commissioners are bound to appoint a fit and proper person. Now, a person who is not legally responsible for the discharge of the duties of the office, cannot, in point of law, be considered a proper person to execute it. The clerk, in this case, is to have the money of the suitors entrusted to his care; he ought, therefore, to be civilly answerable for that money, either if misapplied by himself, or lost by the negligence of his deputy. Possibly he might be liable for a tortious conversion of the money by himself; but he would not be so liable where the money was lost either by his own negligence or that of his deputy; and therefore the public, by the appointment of an infant to the office, would lose that privilege which the law gives them against the principal. I am, therefore, of opinion that an infant was not eligible to this office; and, consequently, that there must be judgment for the plaintiff.

HOLROYD J. I am of opinion that this is an office which an infant cannot legally hold. The officer is to receive the money, which is paid into court. The act of parliament puts a special trust and confidence in him in that respect; and that being so, I am of opinion that, independently of the provisions of the act, he could not legally appoint a deputy. In *Comyn's Digest*, tit. *Officer*, D. 2., it is laid down that a deputy cannot be appointed to an office, if the grant imports a trust or confidence in the person; as, to be squire to the king's body, if a deputy is not allowed by his patent, and for

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CLARIDGE
against
EVALYK.

that the *Year Book*, 11 *Edw.* 4. 1. is cited. Now, by the provisions of this act of parliament, it depends entirely on the discretion of the commissioners, whether they will, in any case, allow a deputy to be appointed; and they may insist that the office shall be executed by the party in person. I think, therefore, the case must be considered as if the office was to be executed by the infant in person. Besides, as the law will not allow an infant to act upon his own discretion, so as to be civilly responsible for his own acts, it will not allow him to be responsible for the acts of others; and, therefore, if he could appoint a deputy, he would not be liable for his acts; and if he is not responsible, he is not a fit person to be put in trust for others; for the public, who paid money to him, would be in a worse situation than if the office was filled by a person of full age, who might be sued. I am, therefore, clearly of opinion that an infant is not a competent person to execute the special trust reposed in the officer by this act of parliament; and, consequently, there must be judgment for the plaintiff.

Judgment for the plaintiff. (a)

(a) *Best J.* absent at Chambers.

Saturday,
October 27th.

HODGSON and Others, Assignees of SEATON and Others, *against* GASCOIGNE.

The growing crops of a tenant having been seized under a *fi. fa.*, a writ of *hab. fac. poss.*

THIS was an action on the case, brought by the plaintiffs against the defendant, as sheriff of the county of York, for not duly executing a writ of non was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord, founded on a demise made long before the issuing of the *fi. fa.*: Held, that the sheriff was not bound to sell the growing crops under the *fi. fa.*, inasmuch as they could not, in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration: Held, also, that the sheriff had no right to allow to the landlord a year's rent, under the stat. of 8 *Ann.* c. 14., that statute contemplating an existing tenancy, which, in this case, must be taken to have ceased on the day of the demise in the ejectment,

omittas

omittas fi. fa. issued at the suit of the plaintiffs against one *Charles Smith*, and for making a false return to the writ. Plea, general issue. The cause was tried at the *York Summer assizes*, 1817, before *Wood B.*, when the jury found a verdict for the plaintiffs for 5000*l.* damages, subject to the opinion of the Court upon the following case.

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HODGSON
against
GASCOIGNE.

The plaintiffs, as assignees of the estate and effects of *J. Seaton* and others, recovered a judgment in *Trinity term*, 1815, against *Smith*, for 20,000*l.* debt, and 80*s.* costs; and on the 14th of *June*, 1816, caused to be issued thereon a writ of non omittas fi. fa. against *Smith*, directed to the sheriff of *Yorkshire*, indorsed to levy 5446*l.* 18*s.* 5*d.* On the 1st of *July*, 1816, the writ was delivered to the defendant, as sheriff of the county, who granted his warrant, directed to one *Foster*, his bailiff, to execute the same. On the same day, the warrant was delivered to *Foster*, who, on the 2d of *July*, entered into a mansion-house, farm, and colliery, then in the occupation of *Smith*, called *Barrowby Hall*, and seized the furniture, stock, crops, colliery, engines and utensils, and other effects found or growing, or being upon the said farm. On the 9th day of *July*, 1816, while in possession of the property, *Foster* received from one *J. Clayton*, as agent for the defendant, a notice demanding 886*l.* 5*s.*, being one year's rent due to the defendant from *Smith*, for the mansion-house, farm, lands, and coal-mines of *Barrowby* aforesaid. The defendant was the owner of these premises; and by indenture of the 13th *February*, 1813, demised the same to *Smith*, habendum, for 21 years, at the yearly rent of 850*l.* and 100*l.* for the colliery, with a proviso for re-entry, on non-payment of rent. In *Michaelmas* vacation,

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against
GASCOIGNE.

vacation, 1815, there being then two years and a half in arrear, a declaration in ejectment was delivered on the two several demises of the defendant and of *R. Oliver Esq.*, which demises were laid on the 5th *December* 1815, and judgment was obtained on the 1st *July*, 1816. On the 15th *July*, 1816, *J. Clayton*, as attorney for the defendant, delivered to *Foster* a warrant, dated 10th *July*, 1816, made by the defendant, as sheriff of the said county, and directed to the chief bailiff of the liberty of the Honour of *Pontefract*, and his deputies (*Foster* being also one of such deputies), upon a writ of possession issued in the cause on the 1st of *July*, 1816, against *Smith*, to recover the defendant's and *R. Oliver's* term to come in the premises. *Foster*, having received the two warrants, sold the furniture, stock and colliery, engines and utensils on the farm on the 18th of *August*, 1816, but refused to sell any of the crops then growing and unsevered thereon, which were of considerable value; and immediately afterwards delivered up possession of the farm and premises to the defendant, with the crops then growing thereon, in pursuance of the warrant issued on the writ of possession. On the 13th *September*, 1816, *Foster* paid to the land agent of the defendant 886*l.* 5*s.* for one year's rent, due to the defendant from *Smith*, on the 13th *February*, 1816, for the farm and premises. The defendant afterwards, as sheriff, returned to the writ of *fi. fa.*, that he had caused to be levied of the goods and chattels of the said *Smith* to the value of 1125*l.* 19*s.*, which money he had ready to render to the plaintiffs; and further certified, that the said *Smith* had not any other goods or chattels in his bailiwick, whereof he could cause to be levied the

residue

residue of the said debt and damages, or any part thereof.

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HODGSON
against
GAWCOTANE.

Tindal, for the plaintiff. There are two questions in this case: first, whether the sheriff ought not to have sold the growing corn, notwithstanding the subsequent delivery of the writ of possession; and, secondly, whether he ought to have allowed the landlord the year's rent, under the statute of 8 Ann. c. 14. Now, the effect of the seizure was to vest in the sheriff the property in the things seized, from the time of the delivery of the writ of execution. On the 1st of *July*, therefore, the property in the corn was divested out of the tenant, and vested in the sheriff, for the purpose of levying the debt; and this case must be considered as if the judgment had been obtained, and the writ had issued at the suit of another landlord. Now, the delivery of a writ of *hab. fac. poss.*, subsequent to the delivery of the *fi. fa.*, will not divest the right of property in the corn growing, which was already in the sheriff. The judgment in ejectment is, that the plaintiff recover his term against the defendant, of and in the premises aforesaid. The writ orders the sheriff *quod habere facias possessionem*. This can only bind from the time of the execution of the writ, for in an action for mesne profits, the course is to give damages up to the time of the execution of the writ. It cannot have any retrospective power, so as to take away any right vested in a purchaser of the crops. Suppose for example, the tenant had sold the crops to a purchaser, and after the sale, the sheriff entered under the *habere facias possessionem*, would the landlord in that case have been entitled to the growing crops. [*Bayley J.* I think that he would, if the sale took place subsequently

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against
GASCOIGNE.

sequently to the day of the demise laid in the declaration in ejectment. For, from that time, the tenant must be considered as a wrongdoer.] The tenant certainly must be taken to be a wrongdoer from the 5 day of *December*, 1815. The statute of frauds, however enacts that no fieri facias, or other writ of execution shall bind the property of goods, but from the time that such writ shall be delivered to the sheriff to be executed. An hab. fac. poss. is a writ of execution and therefore it could only bind the property from the time of its delivery.

ABBOTT C. J. The property in the growing corn, in fact was not vested in the tenant at the time of the seizure, for after the judgment was obtained in ejectment, the defendant is to be considered, in point of law, as a trespasser from the day of the demise laid in the declaration. From that time, therefore, the property was divested out of him, and he had no property at the time when the fieri facias was delivered to the sheriff. The landlord, in an action for mesne profits, might have recovered the value of all the crops.

Tindal. If that be so, the defendant has no right to the year's rent, for the lease determined on the 5th *December*, 1815, as he maintains by his ejectment. The 8 *Anne*, c. 14. evidently contemplates an existing tenancy at the time of the execution, for the words of the statute are, "that no goods lying or being upon any messuage, land, or tenement, which are, or shall be leased for lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, &c." The object of the act was, to make the landlord amends for taking

taking away his power of distress, but here he could have no distress, because there was no tenancy, and the plaintiff contends that the defendant was a trespasser, from the day of the demise-laid in the declaration in ejectment.

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HODGSON
against
GAMCOIGNE.

Littledale, for the defendant, admitted that he could not claim to have the year's rent allowed; upon which

The Court ordered the verdict to be entered for the plaintiff for 886*l*.

Judgment for the Plaintiff.

HARDCASTLE *against* NETHERWOOD.

Saturday,
October 27th.

THE plaintiff declared, that whereas defendant, on, &c., at, &c., in consideration that plaintiff, for the accommodation and at the request of defendant, would accept certain bills of exchange, drawn by defendant upon plaintiff, for 10,455*l*., and would deliver the bills so accepted to defendant, in order that defendant might negotiate the same for his own benefit, defendant undertook, &c. to provide money for the payment of the said bills when the same became due, *and to indemnify plaintiff* from any loss or damage by reason of the acceptance of the bills. Averment, that plaintiff did accept the bills, and deliver them so *accepted* to de-

Assumpsit in consideration 18. 3;
that the plaintiff 36. 32
for the accommodation, 2th 16
and at the request of the defendant, would accept certain bills of exchange, and would deliver them, so accepted, to the defendant, in order that he might negotiate the same for his own benefit. Defendant undertook to provide money for the payment of

the said bills, as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof. Breach, that defendant did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof the plaintiff, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expences: Held, upon demurrer, that, as plaintiff might be entitled upon this declaration to recover special damage, a set-off was not a good plea.

defendant,

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HARDCASTLE
against
NETHERWOOD.

defendant, for the purpose aforesaid. And that, although the said bills were negotiated by defendant for his own benefit, and the same have long since become due, defendant did not provide money for the payment of the said bills when the same became due, nor indemnify plaintiff from damage by reason of his acceptance of the bills, but refused so to do; by reason of which premises, plaintiff, as such acceptor of the said bill was called upon and forced and obliged to pay, and did then and there necessarily pay to the respective holder of the bills, divers large sums of money, together with certain interest, charges, or expences thereon, amounting in the whole to a large sum of money, to wit, 100*l.*, and by means thereof the said plaintiff is damnified to the amount thereof. Defendant pleaded the general issue, and *actio non accrevit infra sex annos*, and also a plea of set-off. The plaintiff demurred generally to the plea of set-off, and the defendant joined in demurrer.

Manning, for the plaintiff, referred to the case of *Auber v. Lewis (a)*, as deciding that to a declaration on a contract, upon which the plaintiff might have sued for unliquidated damages, a set-off could not be pleaded. Upon which the Court called upon

Littledale, for the defendant, who argued that the demand sought to be recovered by the first count was simply a debt, for which the defendant might have been held to bail, without a judge's order, and which might be proved under a commission of bankrupt. Sed

(a) E. T. 1818, K. B. *Manning's Nisi Prius Digest*, 2d ed. p. 251.

Per Curiam. This case cannot be distinguished from that which has been cited. The Court must look to the contract declared on, and if that is such as might entitle the party to recover special damages, the statutes of set-off do not apply, although no special damage be alleged. Here, however, the jury might possibly give damages for the manner in which plaintiff had been forced and compelled to pay the amount of the bills. The defendant might, perhaps, have pleaded a set-off to that part of the count which charges the defendant with the amount of the acceptances paid by the plaintiff.

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HARCASTLE
against
NEWMERWOOD.

Judgment for the Plaintiff.

HARLEY and Another against GREENWOOD.

Monday,
October 29th.

ACTION against the defendant, as the acceptor of four bills of exchange. Plea, that before the defendant became bankrupt, and before the making of the promises in the declaration mentioned, he was indebted to the plaintiffs in divers large sums of money, amounting to 150*l.* for goods sold, and that for securing to the plaintiffs the said several sums of money, defendant, before his bankruptcy, accepted a bill of exchange drawn by the plaintiffs, for and in payment of one of the said several sums of money in which he was so indebted as aforesaid; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums of money in which he so stood indebted as aforesaid. The plea then stated that defendant had duly become bankrupt; and that the bills of exchange mentioned in the declaration were proveable under the commission; and that the plaintiffs, being creditors of the defendant for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission, and thereby made their election to take the benefit of the commission, not only with respect to the debt so proved, but also as to the bills and debts mentioned in the declaration: Held, upon demurrer, that this plea could not be supported; first, because the proof of a debt under the commission of bankruptcy cannot be pleaded in bar to an action at law brought for the same debt; secondly, that the election of the creditor to take the benefit of the commission, is confined by the 49 G. 3. c. 121. s. 14. to the debt actually proved, and does not extend to distinct debts *ejusdem generis* due at the same time.

Declaration upon four bills of exchange. Plea in bar, that defendant was indebted to plaintiffs in divers large sums of money for goods sold; and that, for securing to the

the

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GREENWOOD.

the plaintiffs the payment of the said several sum of money, which so amounted to 150*l.* before 1 bankruptcy, he accepted a bill of exchange for 47 drawn by the plaintiffs on the defendant, and payable three months after date, which bill was accepted by him in payment of one of the said several sum of money in which he was indebted as aforesaid. The plea then stated, that he had similarly accepted each of the several bills of exchange, for which the action was brought in payment of one other of the said several sums of money in which he so stood indebted as aforesaid, and so in the whole amounting to 150*l.* It then stated, that at the time he became bankrupt, and at the time of the commencement of the suit, he was not indebted to the plaintiffs in any further sum of money, than the said several sums, so amounting to 150*l.*, and in payment of which he had accepted the said several bills, and that the promises in the declaration were made by him, upon, for, and in respect of all the several sums of money in which he was so indebted to the plaintiffs, except the sum of 47*l.* The plea then stated the trading of the defendant, the petitioning creditor's debt, and that he became bankrupt, the issuing of the commission, &c. It also stated, that the bills of exchange, and the debts and sums in the declaration mentioned were proveable under the commission, and that, after the passing of the act of the 49 G. 3., the plaintiffs being creditors of the defendant for the said sum of 150*l.*, and for payment of which, the bills of exchange in the plea mentioned were given, the plaintiffs proved the sum of 47*l.*, parcel of the sum of 150*l.*, under the commission, as a debt due from the defendant to the plaintiffs, and
thereby

thereby made their election to take the benefit of the commission, not only with respect to the said debt so proved, but also, as to the bills of exchange mentioned in the declaration, and to the debts and money due to them by virtue of the promises in the declaration. The second plea stated, that the defendant, before he became bankrupt, was indebted to the plaintiffs in a large sum of money, besides the money due and owing from him to them, by virtue of the promises mentioned in the declaration, to wit, the sum of 47*l.* for goods sold, and that the bills of exchange, and debts, and sums of money in the declaration, mentioned at the time of the proof, were proveable, and could, and might be proved under the commission. The plea, then, after pleading the bankruptcy, &c. as in the last plea stated, that afterwards, and whilst the several bills of exchange, debts, and sums of money were proveable under the commission, the plaintiffs being creditors of the said *G. Greenwood* the defendant, as well for the money due and owing to them, by virtue of the promises and undertakings in the declaration mentioned, as for the said sum of 47*l.*, proved the latter sum under the commission, as for a debt due from the defendant to the plaintiff, and thereby made their election, &c. To these pleas the plaintiff demurred. The case was now argued by

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F. Pollock, in support of the demurrer. The 49 G. 3. c. 121. s. 14. enacts, that the proving of a debt shall be deemed an election, to take the benefit of the commission, with respect to the debt so proved. Now the debt proved in this case, was a debt of 47*l.* upon one bill of exchange, and this action is brought to recover sums of money secured by four other bills of exchange. Upon the

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words of this part of the section of the statute, w applies to the case where the creditor first proved debt, the election of the creditor to take the benefit of the commission, is confined to the debt actually proved, and this Court put that construction upon the statute in the case of *Watson v. Medex (a)*, which is precisely the point.

Marryat, contra. The first part of this section of the statute enacts, "that it shall not be lawful for a creditor who has brought any action against the bankrupt, in respect of a demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission without relinquishing such action." Under the first part of the clause, therefore, a creditor for several debts cannot prove a debt in respect of one of them, without relinquishing any action he may have brought in respect of the others. The statute then proceeds in the same sentence to say, that "the creditor so proving or claiming a debt under the commission shall be deemed an election to take the benefit of such commission with respect to the debt so proved." Now the whole of this clause should be construed together, with reference to the law as it stood before the passing of the act, and the mischief which was intended to be remedied. Before the statute, a creditor was not permitted both to come in under the commission, and to proceed at law at the same time for one and the same debt, though he had different securities for it, or to split a demand for that purpose. If a creditor first proved his debt, and afterwards pro-

(a) 1 B. & A. 121.

ceeded at law, although the Lord Chancellor could not directly restrain him from pursuing his legal remedy, yet he put him to his election, and if he elected to abide by his remedy at law, he was discharged as a creditor under the commission. The object of this section of the statute is, to give the bankrupt the same remedy by way of defence at law, as he formerly had upon petition to the Chancellor. Now, if the present case had occurred before the statute, the plaintiffs would not have been permitted to take the benefit of the commission with respect to the 47*l.*, and to have their remedy at law for the other sums of money, for which they have different securities, but which compose one entire debt. It could never have been the intention of the legislature, to make the right of the creditor to proceed both at law and under the commission, depend upon the accidental circumstance of the priority of the action or the proof. In *Ex parte Dickson* (a) the bankrupt had given to a creditor two bills of exchange, one for 100*l.*, and the other for 92*l.* The creditor parted with the latter bill, and brought an action on the former, and took the bankrupt in execution. The 92*l.* bill was afterwards returned to him dishonoured, and he took it up and proved it under the commission. An application was made by the bankrupt to be discharged out of execution, on the ground that such proof was an election to relinquish the action, and to come in under the commission. The Lord Chancellor said, that the act was a remedial law, and must receive a liberal construction, and he made the order on the creditor without prejudice to his proving under the commission. In that case, the credi-

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HABLY
against
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(a) 1 Rose, B. C. 98.

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tor had brought his action for one debt before he his proof in respect of the other. It is an authority therefore, to shew, that a creditor proving for one thereby makes his election to take the benefit of the commission with respect to all the others. In *Ex parte Hardenburg* (a), the Lord Chancellor was of opinion, that a creditor who had not proved, but who had presented a petition, impeaching the commission, and praying that it might be superseded, and that he might be permitted to prove, had made his election to take the benefit of the commission with respect to a debt upon which he proceeded at law, and taken the bankrupt in execution, and the bankrupt was discharged out of custody. The case of *Watson v. Medex* is not exactly in point with the present. The plaintiff there, at the time of making his proof for the first parcel of the goods, the bill for which he then held, was not the holder of the bill for the second parcel; for he had negotiated that bill, and it was not returned to him until after the proof. In this case, the last plea alleges the plaintiff to have been the creditor for the whole sum at the time he proved for a part, and that he was the holder of all the bills at the time he proved one. The debts are all of the same nature, viz. for goods sold, though they are secured by distinct instruments. Taking the whole of the clause together, and considering it with reference to the mischief thereby intended to be remedied, the true construction is, that the creditor should not be allowed to come in under the commission, and to proceed at law at the same time, for one and the same debt, though he has different securities for it.

(a) 1 Rose, B. C. 204.

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 against
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BAYLEY J. (a) There are two questions raised by the pleadings in this case. The first is, whether a creditor for different sums of money, accruing due in respect of debts ejusdem generis (either in respect of several bills of exchange or of several parcels of goods sold,) by proving under the commission for any one of the sums, destroys his remedy at law in respect of the rest. The other question is, whether proof of a debt under a commission of bankruptcy is, even as to the debt so proved, a bar at law in any case. If it be a bar at law, it must become so by the positive enactment of the statute. The 49 G. 3. c. 121. s. 14. enacts, "that it shall not be lawful for any creditor who has brought any action against the bankrupt in respect of any demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission, &c., without relinquishing such action." If the creditor, therefore, had brought any action, he could not seek any remedy under the commission, either in respect of the debt which was the subject of the action, or of any other demand whatever, without entirely abandoning the action. The act then goes on to say, "that the proving or claiming a debt under such commission, shall be deemed an election by the creditor to take the benefit of the commission with respect to the debt so proved or claimed." The question, then, is, is the proving of the debt a bar to the action in any case? Now, the commencing of an action in one court does not destroy the right of the party to commence an action for the same debt in another court. The defendant may, indeed, plead in abatement the pendency of the former action; but he cannot plead it

(a) *Abell C. J.* was absent at the *Old Bailey* when this case was argued.

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HABERY
against
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in bar. The statute in this case does not, in *exp* terms, say that the proving of a debt shall be a bar and there seem to me to be very strong reasons why it should not be so. Suppose, for example, a creditor has proved a debt under the commission which is afterwards superseded; it would be most unjust that he should be barred of his remedy at law in consequence of having so proved his debt. It has been said, however, that the creditor ought to be restrained from commencing his action until the commission is actually superseded. That, however, might be very injurious to him; for his debt might, in the interim, be barred by the statute of limitations. If, for example, the creditor proves a debt under the commission which had been contracted upwards of five years, and the commission is not superseded till the six years expire, he might be barred of all remedy. These inconveniences would arise, if we were to hold that the mere proving of a debt should operate as a perpetual bar. Now, the words of the statute will be satisfied, and a very beneficial remedy given to the creditor, if we hold that, where a creditor has proved his debts, and afterwards brings an action, the bankrupt may, under this act, apply to the Chancellor to expunge the debt, or to the court in which the action is brought, to stay the proceedings. The latter was the course adopted in the case of *Watson v. Medex*. (a) In *Kemp v. Potter* (b), the plaintiff, after he had commenced an action, proved his debt under the commission; the defendant having pleaded bankruptcy, ruled the plaintiff to reply; the plaintiff moved to set aside that rule, with costs, on the ground that the mere proof of the debt under the commission was an

(a) 1 B. & A. 121.

(b) 6 Thurst. 549.

election, and that by force of the statute the action was at an end. The Court, however, were of opinion, that the defendant had a right to have some entry on the record to shew that the action was abandoned, and they discharged the rule. It is clear, therefore, that in that case the Court of Common Pleas did not consider the mere proof of the debt to operate as a bar to the action. For these reasons, it seems to me that this statute does not make the proof of the debt under the commission an absolute bar to the remedy at law, but only gives to the bankrupt an opportunity of applying for relief, either to the Court in which the action is brought to stay the proceedings, or to the Chancellor to expunge the debt. But if that were not so, I am of opinion, that the statute does not apply to the present case. The words are, "that the proving or claiming a debt under such commission shall be deemed an election by the creditor to take the benefit of the commission with respect to the debt so proved or claimed." Now, the debt so proved in this case was 47*l.* only. The argument is, that as there were many other debts ejusdem generis due to the plaintiff at the same time, it must be considered as proof, not only as to the 47*l.*, but as to the whole of the debt due from the defendant to the plaintiff, or, in other words, the proof of parcel of the debt must be considered as proof of the whole; but that is by no means a legitimate conclusion from the premises. The 47*l.* was a distinct debt, due upon one bill of exchange, and the other sums of money were distinct debts, due on the other bills, and the bills themselves were not given for that which had been one entire debt, but in payment of distinct sums of money due for four several parcels of goods; and the debts, therefore, were originally contracted as

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distinct and separate debts. I cannot, therefore, say that the proof of the 47*l.*, which was not originally parcel of one entire debt, and which was not afterwards covered by one entire security, can be considered as any proof of the other debts; and I am, therefore, of opinion, that although the creditor is to be considered as having made an election in respect of the 47*l.*, the debt proved, he is not to be considered as having made an election as to the other distinct debts *ejusdem generis* due at the same time. The judgment, therefore, must be for the plaintiff.

HOLROYD J. I am also of opinion that the plea cannot be supported. The statute 49 G. 3. c. 121. s. 14., provides for different cases; the one where an action is brought before the debt is proved, and the other where the debt is proved previously to any action. With respect to the first case, the words are very general, and amount to an absolute prohibition of the proving any debt, until the action is abandoned. According to the literal construction of that part of the clause, therefore, the bringing of an action for one debt will prevent the creditor from proving altogether, though for a distinct debt. With respect to the second case provided for, the statute enacts, "That the proving or claiming a debt under the commission, shall be deemed an election by the creditor, to take the benefit of the commission with respect to the debt so proved or claimed." The words of the statute do not make the proof of a debt an election with respect to separate and distinct debts, but only with respect to the debt actually proved or claimed. In this case, the debt proved was a distinct and separate debt. The words, therefore, of this part
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of the section, do not make the proof of that distinct debt such an election to take the benefit of the commission, as to deprive the plaintiff of his right of action in the present case. I am clearly of opinion that it is no bar to the action; if it were, it would, in some cases, operate as a great hardship upon the creditor; for example, after the proof of his debt, the commission might be superseded, and if he were not allowed to bring any action while the commission was pending, he might be barred by the lapse of time. It might indeed happen, that the debt proved was the only debt due to the creditor himself at the time he made the proof. That was the case in *Ex parte Dickson*. In this very case, the four bills of exchange might have been in the hands of other parties, at the time when the plaintiff proved his debt in respect of the other, and it would certainly be a great hardship upon him, that the proof of the only debt then due to him should bar him of his right of action in respect of debts that afterwards accrued. For these reasons, I am of opinion, that, although if an action be brought after proof of a debt, it may be a ground for a defendant, either to apply to the court in which the action is brought to stay the proceedings, or to the Chancellor to expunge the debt, still the previous proof of the debt cannot be pleaded in bar to the action, and, consequently, that in this case there must be judgment for the plaintiffs.

BEST J. It is unnecessary to decide in the present case, whether the proof of the very debt for which the action is brought, which would have been an election to take the benefit of the commission as to that debt, could have been pleaded in bar. I incline to think that it could not, for, to make it a good bar, the debt must be

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be extinguished. Now, here, there was no extinguishment of the debt; for, if the commission had been superseded, the party would clearly have had a right to bring an action. The proper course in such a case for the party to pursue, is either to apply to the Chancellor to expunge the debt, or to the Court in which the action is brought to stay the proceedings. In the latter case, the Court may stay the proceedings only upon the defendant's undertaking not to plead the statute of limitations in case the commission were superseded. I am, however, clearly of opinion, that the facts stated in the plea afford no answer to the present action. The substance of the plea is, not that the plaintiff has proved the debt, but that he has proved another debt, and that that proof is an election to take the benefit of the commission in respect of all the debts then due to him from the bankrupt. The statute only says, that if a party proves a debt, he makes his election as to that debt; and we should go greatly beyond the words of the statute, if we were to hold that he made his election, not only as to that debt, but as to every debt due to him. The instances already mentioned shew, that if that were the law, it might be attended with great injustice. For these reasons, I think there must be judgment for the plaintiffs.

Judgment for the Plaintiffs.

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LAWRENCE *against* ABERDEIN.Monday,
October 29th.

ASSUMPSIT upon a policy of insurance. The declaration stated a total loss of the animals insured, by perils of the sea on the voyage. Plea, general issue. At the trial, before *Best J.*, at the *London* sittings after *Trinity* term, 1820, a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case.

The policy was effected on the 30th *December*, 1819. The voyage insured was at and from *Cork* to *Barbadoes* and *St. Vincent's*; and at the foot of the policy the insurance was declared to be on thirty mules, ten asses, and thirty oxen, warranted *free of mortality and jettison*. On the 17th *January*, 1820, the ship sailed with the animals insured, properly stowed on board, on the voyage insured. On the 19th of the same month, a violent storm arose, which caused the ship to labour and pitch. This lasted, without intermission, until the 30th of the same month, when, for the preservation of the ship and cargo, and on account of the damage which the ship had sustained from the violence of the storm, the ship put into *Mount's Bay*, in *Cornwall*, in order to refit. On the first day of the storm, from the violent pitching and rolling of the ship, occasioned by the storm and consequent agitation of the sea, two of the mules, one of the oxen, and five of the asses were killed; the remainder of the animals, from the same causes and perils of the sea, on that and the following days, until the 30th of *January*, received such violent and severe bruises, lacerations, and injuries, that all of them died

A polic was effected on living animals, warranted free from mortality and jettison. In the course of the voyage, some of the animals, in consequence of the agitation of the ship in a storm, were killed; and others, from the same cause, received such injury that they died before the termination of the voyage insured: Held, that this was a loss by a peril of the sea, for which the underwriters were liable.

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died in consequence thereof, before the ship sailed again in prosecution of her voyage from *Mount's Bay*, which she did on the 14th *February*, 1820, excepting six mules and one ass, one of which six mules afterwards died from the same cause, before the arrival of the ship at *Saint Vincents*. The ship arrived at *Saint Vincents*, with the remaining five mules and one ass, on the 24th *March*, and delivered the rest of her cargo in safety. The question for the opinion of the Court was, whether the plaintiff was entitled to recover for the loss of all or any and which of the animals insured?

F. Pollock, for the plaintiff. The underwriters are not exempted from the loss that has happened by the word of the special exception, "warranted free from mortality." These words were introduced into the policy by the underwriters, and must therefore be taken most strongly against them. The word mortality signifies death arising from natural causes. Here, the death of the animals arose directly from the violence of the tempest, and not from natural causes. The loss did not therefore arise from mortality, if that word be understood in its ordinary and popular meaning. Some effect will be given to the exception, by construing the word in that sense; for the underwriters will thereby be exempted from one species of loss for which they might otherwise be responsible, viz., in the event of the death of the animals by sea-sickness in a storm. For such a loss the underwriters would be answerable under a common policy. But they would be exempted by the special exception,

Campbell,

Campbell, contra. Some effect must be given to the words of the exception, so as to extend to the underwriters a protection against some species of loss to which they would have been liable, if those words had not been introduced into the policy. Now they would not have been liable for any loss arising from the natural death of animals, but they would have been liable if they had been drowned in a tempest or killed in battle. *Pothier, Traité du Contrat d'Assurance, c. 1. s. 2. art 2. s. 3., and Valin, Ordonnances de la Marine, liv. 5. tit. 6. art 11.* Here the animals died in consequence of the injury they received during the storm, and the underwriters, therefore, would have been liable for this loss, under a policy in the common form. The exception, therefore, was introduced for the purpose of exempting them from all losses whatever, arising from the vitality of the subject matter insured, or, in other words, to reduce the risk to the same level as if the subject matter insured was inanimate goods. If that had been the case here, the cargo might have received little or no injury. If the words "free from mortality" be construed only to protect the underwriters against losses arising from death from natural causes, no effect whatever will be given to the exception; for, in such a case, the underwriters would not have been liable under a policy in the common form. The true meaning of the exception is, that the underwriters are to be liable for all the risks to which they would have been subject, if they had insured inanimate goods. By this construction they will still be liable for losses by capture by enemies or pirates, or barratry of the master or mariners.

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ABBOTT C. J. I am of opinion that the underwriters are answerable for this loss. The insurance was on living cattle, which, in the course of the voyage, have been killed by the rolling of the ship in a violent tempest. They have been killed, therefore, by a peril of the sea. Under the general terms of the policy, the underwriters would be answerable. It lies on them, therefore, to shew that there is a special exception in this policy applicable to the present case, in order to relieve them from the effect of their general liability. The expression used in the policy is "free from mortality." Now the word mortality, in its ordinary sense, never means violent death, but death arising from natural causes. There may however, indeed, be a remote cause, which may sometimes superinduce a natural cause. In *Tatham v. Hodgson (a)*, the want of provisions was the immediate cause of the death of the slaves; the remote cause was the circumstance of the ship having been driven out of her course by the perils of the sea, in consequence of which, the provisions, which otherwise would have been sufficient for the voyage, were exhausted. There was not any exception in the policy in that case. But the statute of the 34 Geo. 3. c. 80. s. 10. had enacted, "that no loss or damage should be recoverable on account of the mortality of slaves, by natural death or ill treatment, or against loss by throwing overboard of slaves, on any account whatsoever." A question was made, whether the death of the slaves so arising, indirectly and remotely from the peril of the sea, was not one for which the underwriters were liable; and the Court held that they were not liable, because it was a loss arising by

(a) 6 Term Rep. 656.

natural

natural death; and if the ship, in this case, had been driven out of her course by the perils of the sea, and the voyage thereby had become so protracted as to exhaust all the provisions, and, consequently, the means of sustaining the life of the animals insured, I think that the words "warranted free from mortality," introduced into this policy, would have protected the underwriters from that loss for which they otherwise would have been liable, as for a loss arising from the perils of the sea. And if there be any one case, in which effect can be given to those words, understanding them in their ordinary and popular sense, they ought not to be extended beyond that sense. There is very great difficulty, in construing these words, to give a protection to the underwriters against all losses arising from the vitality of the animals. Suppose, for example, a valuable horse, by the motion of a vessel in a storm, were to have his legs broken, but to arrive alive at *Saint Vincents*, the animal would be of no use; the underwriter would be liable for that loss; but if the animal were actually killed, he would not be liable at all. It could hardly be the intention of the underwriter that he should be liable in one of these cases and not in the other. If the construction I have put upon this very ambiguous phrase is not the sense in which it has been generally understood at *Lloyd's Coffee-House*, it will be very easy to introduce into policies other words, which shall more clearly express the meaning of the parties. In this case, therefore, there must be judgment for the plaintiff.

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BAYLEY J. My mind has not been free from doubt during the discussion of this subject; but I am now of opinion, that the assured is entitled to recover. Under a policy

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a policy in the common form, the assured would have been entitled to recover, either in case of the total destruction of the animals, or for any less injury, provided it was occasioned by any of the perils insured against. The words, "warranted free from mortality," are introduced into this policy by the underwriter for his benefit. It is his duty, therefore, to take care to frame his exception in words sufficiently large and extensive to meet all those descriptions of loss against which he intends to protect himself. The word "mortality" may, under certain circumstances, include every description of death, every termination of life to which mortals are subject. It applies generally, however, to that description of death which is not occasioned by violent means. If a great number of the crew, or of animals shipped on board a ship, were killed in the course of an engagement with an enemy, it would not be correct to say that there had been a great mortality among the crew, or among the animals. If, on the other hand, they had come to their death by any natural cause, the term *mortality* would be properly applied to express the cause of such death. If, in this case, the animals insured had died from sea-sickness, occasioned by the agitation of the ship, or in consequence of any other disease, contracted in the course of an unusually protracted voyage, the term mortality might apply to that description of natural death, so superinduced by the voyage. Under a common policy, if the declaration stated, that the ship had met with tempestuous weather, and that the animals thereby became disordered, diseased, and died, and it be proved that their death was imputable to the agitation of the ship, occasioned by the tempestuous weather, that would be a loss by a peril of the sea, for which

which the underwriters would be liable. The exception introduced into this policy would, in my opinion, protect them from such a loss. The word "mortality" here used, may, therefore, receive a construction which will afford some protection to the underwriter, without extending it beyond its ordinary and popular sense. If we were to hold, that the exception protected the underwriter from every loss to which the property was subject, in consequence of the subject-matter insured being alive, instead of dead, this absurd consequence would follow, that if by the violent agitation of the sea the animals had their legs broken, and thereby became of no value to the owner, but arrived alive at *St. Vincent's*; the underwriter would be responsible. Whereas, if they had died during the course of the voyage, he would not be liable at all. The circumstance of these words of the exception not being calculated to protect the underwriter from any loss, in the event of the animals receiving any injury short of death, seems to me to shew, that they were not intended to exempt them from a loss by the actual death arising immediately from a peril of the sea. I think that the words used in this exception will protect the underwriter in cases where the death of the animal arises from natural causes remotely produced by some of the perils insured against; but that they will not protect him where such death arises directly from any of the perils insured against. For these reasons, I am of opinion that there must be judgment for the plaintiff.

HOLROYD J. I am of the same opinion. Although death may have been the immediate cause of the loss, and may have made the actual loss to the assured

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greater than it otherwise would have been, still, as the injury to the animals which occasioned their death was caused directly by the violence of the storm, I am of opinion that this is to be considered as a loss by the perils of the sea. It, consequently, falls within the risks enumerated in the policy; and, it seems to me, that it is not excepted out of those perils by the words "warranted free from mortality and jettison." Independently of those words, the underwriters would undoubtedly have been liable as for a loss arising from a peril of the sea. Those words were the language of the underwriters, and were introduced by them to protect themselves from a particular species of loss. By the terms of the policy, they insured against the perils of the sea, &c., and all other losses and misfortunes that should come to the hurt, detriment, and damage of the subject-matter insured. Now, the exception must be considered as ingrafted upon these general words in the policy, and the whole should be read together as one sentence; and then it would stand thus: that the underwriters will be liable for losses by perils of the seas, and all other losses except losses by mortality and jettison. It seems to me, that as the injury which immediately preceded and caused the death of the animals proceeded directly from the violence of the storm, the loss is to be considered a loss by the perils of the sea. Death may or may not have increased the amount of the actual loss to the assured. With respect to the mules and asses, the entire loss arose from the perils of the sea, and was neither increased nor diminished by their death. For, after receiving a mortal wound, they became of no value to the owner, and death consequently did not in any degree
increase

increase the loss. The case might be different with respect to the oxen; if they were killed after receiving an injury, their flesh might be of some value as food, and, consequently, their death may have increased the loss in some degree. But still, as the previous injury was occasioned by the perils of the sea, whether the death of the animal did or did not increase the amount of the actual injury to the owner, I am of opinion that it must be considered a loss by the perils of the sea. The circumstance of the parties having inserted in the exception the word *jettison*, satisfies me, that they did not contemplate the case of violent death. For, although it is possible that the animals thrown overboard might, under favourable circumstances, reach the shore and survive, yet I think that the term usually denotes the throwing overboard in a storm, when there would be little probability of animals surviving; and that it must, therefore, mean a jettison whence death ensues. Now, if the term "mortality" were intended to protect the underwriter in every case of the animals meeting with a violent death, the introduction of the word "jettison" would be superfluous, as that species of loss would be covered by the word "mortality." Besides, this absurd consequence would follow; if we were to give to the words used in the exception the construction contended for by the defendant, that where the violence of the wind and waves was so great as to cause the death of the animals during the voyage, the underwriters would not be liable at all; but where the violence of the wind and waves was only such as to cause some injury to the animals, short of death, then the underwriters would be responsible. For these reasons, I am of opinion that the word *mortality*, in this policy, must be understood in its ordinary

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and popular sense, as importing death arising from natural and not from violent causes. And that being so, there must be judgment for the plaintiff.

BEST J. I am of the same opinion. At the time when this policy was effected, this country was at peace with all the world, and there was not any probability of the vessel being captured by enemies. Capture by pirates on the voyage insured was equally improbable, and a loss by barratry was not very likely to happen. If the underwriters are not liable for the loss in question, they can hardly be liable in any case, for there is not any other species of loss arising from the destruction of the animals, of which death may not be considered the immediate cause. If the ship was even sunk or burnt, death would be the immediate cause of the destruction of the animals, and consequently, according to the construction contended for, such a case would fall within the exception as a loss by mortality. The exception is introduced into the policy by the underwriters. If they had intended to exonerate themselves in every case of death occasioned by a peril of the sea, they should have used words apt and proper to express that intention. They might have stipulated, that they would not be liable for the death of the animals unless the ship were stranded or lost, and then they would not have been liable for the loss that has occurred in this case. They have only stipulated, that they will not be liable for loss by mortality. That word, in its ordinary and popular sense, signifies death arising from natural causes, and not from violence. I think, therefore, that the underwriters must be taken to have intended to exempt themselves, by this exception, from that species of loss which occurred

red in *Tatham v. Hodgson*, viz. a loss of which death was the proximate cause, and the perils of the sea the remote cause. Here the injury done to the animals arose directly and immediately from the violence of the tempest, or in other words, from the perils of the sea. For these reasons, I am of opinion, that the plaintiff is entitled to the judgment of the Court.

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Judgment for the plaintiff.

LONGRIDGE and Others *against* DORVILLE and
Another. Monday,
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DECLARATION alleged, "that before the making of the promise, &c. a certain ship, called the *Carolina Matilda*, had then lately in a certain place, (to wit,) in the *River Thames*, (to wit,) at, &c. run foul of a certain other ship called the *Zenobia*, whereby the said last-mentioned ship had received great damage. And the said last-mentioned ship having received such damage, in consequence of being so run foul of as aforesaid, the plaintiffs, being the agents in that behalf of one — Symonds, the owner of the *Zenobia*, and the defendants, being the agents in that behalf of the owners of the

The giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and, therefore, where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of

the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages: Held, that there being contradictory decisions as to the point, whether ship owners were liable for an injury done while their ship was under the controul of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages.

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Carolina Matilda, the former, as such agents, detained the *Carolina Matilda*, till the owners of the said last-mentioned ship should have made good to them the damage so done to the *Zenobia*." It then stated, "that in consequence of such detention, the defendants undertook that they would, on the plaintiffs renouncing all claims on the *Carolina Matilda*, and on proving the amount of the damages sustained by the *Zenobia*, indemnify the plaintiffs for any sum not exceeding 180*l.*, the exact amount to be ascertained when the said latter ship should have been repaired;" and then alleged, that, in consequence of such undertaking, the plaintiffs did renounce all claim on the *Carolina Matilda*, and did permit and allow her to proceed on her voyage, and that the *Zenobia* had been repaired, and that the amount of such repairs was ascertained. There were also the common counts, and the defendants pleaded the general issue. The cause was tried before Abbott C. J. at the sittings after Easter term, 1820, when a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case:

The Norwegian ship, called the *Carolina Matilda*, on her voyage to Norway, in sailing down the river Thames in November last, ran foul of the ship called the *Zenobia*, then lying at anchor, and in consequence of which, the latter ship sustained considerable damage. The plaintiffs, acting as the agents of Mr. R. Symonds, the owner of the *Zenobia*, instituted a proceeding in the High Court of Admiralty against the ship *Carolina Matilda*, to compel her owners to make good the damages sustained by the *Zenobia*, in consequence of being so run foul of. Process was issued against the *Carolina Matilda*, under which she was arrested

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arrested at *Gravesend* on the 22d *November* last, and on the 24th day of the same month, the defendants wrote a letter to the plaintiffs, of which the following is a copy: "Messrs. *Longridge, Barnett, and Hodgson*. Gentlemen, In consequence of your having detained the *Norway* ship *Carolina Matilda*, till the owners make good to you the damage done to the *Zenobia*, bound to *Smyna*, we hereby engage, on your renouncing all claims on the said ship *Carolina Matilda*, and on proving the amount of damages sustained by the *Zenobia*, to indemnify you for any sum not exceeding 180*l.*, the exact amount to be ascertained when the *Zenobia* is repaired." The defendants were the agents of the owners of the *Carolina Matilda*, and upon the receipt of this letter, the plaintiffs withdrew the proceedings in the Admiralty Court, and the officer, then in possession of the *Carolina Matilda*, was then also withdrawn, and such possession delivered up to the defendants, acting on behalf of her owners. The *Zenobia* had been since repaired, and the amount of damages sustained by her had been ascertained. At the time the *Carolina Matilda* sailed, and while she was proceeding down the river and ran foul of the *Zenobia*, she had the regular *Trinity-house* pilot aboard, who had been placed there by the defendants.

Puller, for the plaintiff. It is not necessary to consider the question, whether the owners of the *Carolina* are liable for the damage done to the *Zenobia*, under the circumstances of the case; for the defendants have made themselves liable by an express promise, founded upon a good consideration. The plaintiffs agree to release the ship, which they might otherwise have detained until

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bail was given; and the defendants agree to pay a stipulated sum by way of damage; waiving all question as to the legal liability of the owners. That might be considered as doubtful, there having been contradictory decisions. (a) The defendants, or their principals, therefore, have obtained a benefit by the immediate release of the ship; and that constitutes a good consideration for the promise laid in the declaration.

F. Pollock, contra. There is no sufficient consideration for the promise in the declaration, because the plaintiffs had no ground for instituting the suit in the Admiralty Court against the *Carolina*. The question whether the defendants are liable upon their undertaking, must depend upon this, whether the owners were liable for the injury, the ship at the time having on board a pilot, as required by the act of parliament. If they were not liable, the plaintiff had no right to institute the suit in the Admiralty Court; and the forbearance of a suit, where a party is not liable, is not a good consideration. *Tooley v. Windham* (b) and *King v. Hobbs* (c) are authorities in point.

ABBOTT C. J. I am of opinion, that there is a sufficient consideration in this case to sustain the promise, without enquiring whether the owners of the ship are liable, under the circumstances of the case. It appears that a suit had been instituted by the plaintiffs in the Court of Admiralty against the *Carolina Matilda*, to compel her owners to make good the damage done by

(a) *Neptune the Second*, *Dodson*, *Adm. R.* 467. *Ritchie v. Bunsfield*, 7 *Tunst.* 309.

(b) *Cro. Elis.* 206.

(c) *Felverton*, 25.

her running foul of another vessel. The ship might have been redeemed from that suit, by the defendant's giving bail, that proper care should be taken of the ship, and that those on board her should not leave the kingdom, until means were taken to secure that evidence which would enable the Judge to decide the suit, and the plaintiffs might have insisted on such bail. The defendants, as agents for the foreign owners of the ship, write a letter, in which they engage, on the plaintiff's renouncing all claims on the ship, and on proving the amount of damages sustained by the *Zenobia*, to indemnify them for any sum not exceeding 180*l.*, the exact amount to be ascertained when the *Zenobia* is repaired. Now the plain meaning of that engagement appears to me to be this. Release the ship, and we will waive all questions of law and fact, except the amount of damage; we will pay you 180*l.* if the damage done amounts to that sum. The plaintiffs, by not insisting upon the bail required, therefore relinquished a benefit which they might have had, if the law had been with them. The law might fairly be considered as doubtful, for there had been contradictory decisions on the subject; and the parties agree to put an end to all doubts on the law and the fact, on the defendants engaging to pay a stipulated sum. I am of opinion that this case is distinguishable from those cited in argument, inasmuch as in this case, the law was doubtful, and the parties agreed to waive all questions of law and fact. I am therefore of opinion, that the plaintiff is entitled to recover.

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BAYLEY J. I am of the same opinion. Where a cause is depending, it is competent to a party to refer the questions of liability and damage jointly, or to ac-
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knowledge his liability, and refer the question of damage only; and in this case, I think, the effect of the agreement is, that they the defendants acknowledge the liability of the owners, and, in consideration of the plaintiffs' releasing the ship, they agree to refer the question as to the amount of damage, and pay the same, provided it does not exceed 180*l*. If it had appeared, in this case, that the owners of the *Caroline* could not have been liable at all, I agree that the consideration for the promise would have failed. But the facts stated in the case by no means shew that the owners would not have been liable; for by the pilot act, the owners are only protected in those cases where the loss arises from the default, neglect, incapacity, or incompetency of the pilot. Now there is no fact in this case which shews, that misconduct of the pilot was the cause of the injury.

HOLROYD J. I am of the same opinion. If a person is about to sue another for a debt, for which the latter is not answerable, the mere consideration of forbearance is not sufficient to render him liable for that debt. Any act of the plaintiff, however, from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, is a sufficient consideration to support a promise. Now, the consideration of forbearance is a benefit to the defendant, if he be liable; but it is not any benefit to him, if he be not liable. The authorities cited proceed on that ground. This case differs materially from those; for here, a suit actually commenced is given up, and a suit, too, the final success of which was involved in some doubt. The plaintiff might sustain a detriment by
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giving up all claim in respect of the expenses incurred, and the defendant might derive a benefit, by having that suit put an end to, without further trouble or investigation. Now I am of opinion, that the giving up of a suit instituted for the purpose of trying a doubtful question, and consenting to deliver up the ship, which might otherwise have been detained until the security required was given, is a good consideration to support a promise to pay a stipulated sum, by way of damage, in case the actual damage amount to that sum. In *Com. Dig. tit. Action on Case upon Assumpsit*, F 8., it is laid down, that an action does not lie, if a party promise, in consideration of a surrender of a lease at will; for the lessor might determine it, unless there *was a doubt* whether it was a lease at will or for years; and 1 *Roll.* 23. l. 25. 35. and 1 *Brownlow*, 6. are cited. That is an authority to shew, that the giving up of a questionable right is a sufficient consideration to support a promise. Here, therefore, the giving up of a suit, instituted to try a question respecting which the law is doubtful, is a good consideration to support a promise. I think, therefore, that this action is sustainable.

BEST J. concurred.

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against
DORVILLE.

1821.

Monday,
October 29th.

RAWLINSON *against* PEARSON and Others.

A pawnbroker is a broker within the 5 G. 2. c. 30. s. 39., and, therefore, subject to the bankrupt laws.

A person who had formerly taken in goods upon pledge, but had ceased to do so, still continuing to sell the unredeemed pledges, thereby carries on the trade of a pawnbroker, and is subject to the bankrupt laws.

ASSUMPSIT for money had and received. Plea, general issue. At the trial before *Park J.*, at the *Lancaster* Spring assizes, 1820, a verdict was taken for the plaintiff, subject to the opinion of the Court on the following case:

On the 2d *June*, 1818, a commission of bankrupt issued against the plaintiff, on the petition of *Daniel Potter*, under which commission the plaintiff was declared a bankrupt, and the defendants were chosen assignees, and as such, received certain money, the produce of the estate of the plaintiff. The petitioning creditor's debt was upon a promissory note, drawn by the plaintiff, in favour of *Potter*, for the sum of 311*l.* 3*s.* 9*d.*, bearing date the 17th *January*, 1818, payable at three months after date, and which note was dishonoured when due. This note had been given by the plaintiff to *Potter* for the amount of the damages and costs awarded to *Potter* in an action brought by him against plaintiff, for an injury occasioned by the negligence of one of the agents of the plaintiff. The award was made on the 15th *January*, 1818. The plaintiff, for many years, had carried on the business of a pawnbroker at *Manchester*, but for nearly five years before the issuing of the commission, he had ceased to take in any goods to pledge; he had a shop for sale and another for taking in pledges. The two shops adjoined each other; there had been an internal communication between them, until it was stopped up about

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five years ago : his pawnbroker's sign, however, remained over the door of the shop for sale until after the issuing of the commission. After the time when he so ceased to take in goods to pledge, he sold, from time to time, to any persons willing to purchase the same, different articles of the forfeited or unredeemed pledges which he had received in the course of his business as a pawnbroker, and which still remained upon hand ; the shop for sale remained open, till the issuing of the commission, to sell off his forfeited pledges, and he could not carry on his business without it. The act of bankruptcy was committed in *February, 1818*

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Tindal, for the plaintiff. There are two questions in this case, first, whether a pawnbroker is subject to the bankrupt laws ; 2dly, assuming that he is, then, whether the plaintiff in this case continued to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued. A pawnbroker is not a trader ; for he does not seek his livelihood by buying and selling. The question, then, is, whether he can be considered as a broker within the meaning of the *5 G. 2. c. 30. s. 39*. That section of the statute recites, that bankers, brokers, and factors are entrusted with money and goods belonging to other persons ; and then enacts, that they shall be subject to the bankrupt laws. The reason of the statute is on account of the great value of property belonging to others with which the persons there described are trusted. Now, pawnbrokers are not within the reason of the statute, for the property which they have in their possession, belonging to others, does not usually greatly exceed in value the money advanced upon it. There is not, therefore, the same trust reposed

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against
PEARSON.

reposed in them as there is in the case of bankers, or brokers, or factors. They are not, therefore, within the spirit of the statute; nor are they within the words of the statute; for they cannot be considered as brokers; that term being used to denote a person who makes bargains for other persons. They were not considered brokers at the time when the 5 G. 2. c. 30. passed. The statute 1 Jac. 1. c. 21. speaking of the sworn-brokers of the city of *London*, describes them to be persons who never, of any ancient time, used to take pawns and bills of sale of garments and apparel, &c. for money lent upon usury, or to keep open shops, as of late years had been used by citizens, assuming to themselves the names of brokers and brokerage, as though the same were an honest trade; terming themselves brokers *whereas in truth* they are not, abusing the true and ancient name and trade of broker. In sect. 3. they are styled counterfeit brokers and pawn-takers upon money, &c. They are not again mentioned in any other statute before the 5 G. 2. s. 30. passed. In the 30 G. 2. c. 24. s. 4., they are described as persons who take goods by way of pawn. In the 25 G. 3. c. 48. they are, for the first time, called pawnbrokers by the legislature. At all events, the plaintiff had ceased to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued. The 30 G. 2. c. 24. describes pawnbrokers to be persons taking goods by way of pawn, pledge, and exchange. Now, the plaintiff had ceased to take goods by way of pledge long before the petitioning creditor's debt accrued. He, indeed, sold the unredeemed pledges. That was not any necessary part of his business of a pawnbroker described in the statute; it only became necessary in consequence of the pawners not redeeming the
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the goods pledged within the time prescribed by law. At all events, this was only one part of the business belonging to a pawnbroker.

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Parke, contra. A pawnbroker is a person subject to the bankrupt laws, and falls within the meaning of the word broker in the 5 G. 2. c. 30. s. 39. Lord *Hardwicke*, within five years after the passing of that statute, stated that he was clearly of opinion, that "a pawnbroker was within the several statutes concerning bankrupts, and especially within the general words of the 5 G. 2., and that, although pawnbrokers are not expressly named, yet the general word *brokers* is the genus, and all other kinds of brokerage, the species."

Higmore v. Molloy. (a) It seems therefore, that, at the time of passing the act, a pawnbroker was considered as a species of broker. He seems, indeed, to be a person contemplated by the very first statute made against bankrupts, the 34 and 35 Hen. 8. c. 4. For a pawnbroker is "a person obtaining into his hands great substance of other men's goods." The stat. of the 5 G. 2. did not contemplate such persons only; for a broker, (one of the persons expressly named,) is very rarely entrusted with the possession of the goods of the persons for whom he makes bargains. Assuming therefore, that a pawnbroker is a subject of the bankrupt laws, the present plaintiff continued to carry on that business at the time when the petitioning creditor's debt accrued. The profits of the business (if fairly conducted) are derived wholly from the increased rate of interest which pawnbrokers are allowed to take on the money they advance upon goods. They are authorized to sell the goods

(a) 1 *Atkyns*, 206.

pledged

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pledged at the expiration of one year, provided they are not redeemed within that time. In that case, unless they sell the goods, they could not derive any profits whatever from their business, because they would not receive that interest which the law allows them as their only profit. Indeed, if the plaintiff ceased to carry on the business of a pawnbroker when he discontinued taking in goods on pledge, the consequence would be, that he would have been guilty of usury, by taking that rate of interest which the law allows a pawnbroker alone to receive. The plaintiff in this case, at the time when the petitioning creditor's debt accrued, was still selling the unredeemed pledges, and receiving the increased interest on account of the money he had advanced; he therefore continued to carry on the business of a pawnbroker. This very case was, on a former occasion, argued fully before the Judges (a) of the Court of Common Pleas at *Lancaster*, and they, after great consideration, gave judgment for the defendants.

ABBOTT C. J. I am of opinion, that a pawnbroker is a broker within the meaning of the stat. 5 G. 2. c. 30. The 39th section of that act recites, "that persons dealing as bankers, brokers, and factors, are frequently entrusted with great sums of money, and with goods and effects of very great value belonging to other persons," and then enacts, "that such bankers, brokers, and factors, shall be subject to this and other statutes made concerning bankrupts." Now, a pawnbroker certainly is a person contemplated in the preamble. For in the course of his trade, he is perhaps more frequently than other persons, entrusted with goods and effects of value

(a) *Wood B.* and *Bayley J.*

belonging to others. He comes also within the general name of broker. The opinion of Lord *Hardwicke* upon this subject is entitled to great weight; but even without the aid of his authority, I should have entertained no doubt, that a pawnbroker is within the spirit and words of the act. The next question is, did the bankrupt continue to carry on the trade of a pawnbroker, at the time when the petitioning creditor's debt accrued? Now, the trade of a pawnbroker consists of two parts: first, that of receiving pledges of others, and secondly, that of selling those pledges. In this case, he had ceased to take in pledges, but he continued to sell them, subject to the conditions imposed by law. One of those conditions was, that he was to account for the overplus to the owner of the goods; the party pledging, having a right to redeem within a certain time, on paying a rate of interest much exceeding 5 per cent. per annum. Now, it would be unlawful for the plaintiff to take that rate of interest, except in his character of pawnbroker. As long, therefore, as the pawners of the goods had a right to redeem, the plaintiff was clearly carrying on the business of a pawnbroker, and even when he sold the goods, he was bound to account to the owner for the overplus, and therefore, as long as he continued to sell the forfeited pledges, he sold as a pawnbroker. He therefore continued to carry on the business of a pawnbroker at the time when the commission issued. In this case, I am therefore clearly of opinion, that a pawnbroker is a broker within the meaning of the stat. 5 G. 2. c. 30. s. 39., and that the present plaintiff continued to carry on the business of a pawnbroker at the time when the debt of the petitioning

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 RAWLINSON
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against
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creditor accrued. The judgment therefore must be for the defendants.

BAYLEY J. I am clearly of opinion, that a pawnbroker is a broker within the meaning of the 5 G. 2. c. 30. s. 39. I think that he must have been so considered at the time of passing that act. For *Lord Hardwicke*, within a very few years afterwards, considered a pawnbroker to be a person clearly within the meaning of the act. He is certainly within the mischief intended to be remedied. For in the course of his business, he is entrusted with effects of value, for which he is accountable to many different persons. From the very nature of his business, therefore, he would be liable to a great many suits, the expense of which might be ruinous to his estate, and detrimental to those who sue him. Now one of the great objects of the bankrupt laws is, to distribute the property of the bankrupt rateably among the creditors, without driving each individual to the necessity of bringing an action. A pawnbroker, therefore, comes within that very description of persons whom the legislature intended to be subject to the bankrupt laws. This case was formerly discussed before the Judges of the Court of Common Pleas at *Lancaster*; and without attaching any degree of weight to the opinion of one of the Judges who concurred in the former decision, I may say, that, upon that occasion, the parties had the benefit of the judgment, experience, and learning of Mr. *Baron Wood*, who, after great and careful consideration, gave his deliberate opinion, that it was a case within the words and the spirit of the statute 5 G. 2. c. 30. s. 39. On the other
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point I cannot entertain any doubt. Part of the business of the pawnbroker is to take in pledges, and hold them in his hands, charging a higher rate of interest for the money he advances than the law in other cases allows; the other part of his business is to sell the pledges, on the joint account of himself and the person by whom the goods were pawned. As long therefore as he continues to sell, he sells in the character of pawnbroker, and continues to be accountable to the proprietors for the value of the goods. If, indeed, we were to hold, that he ceased to carry on the trade of a pawnbroker, when he ceased to take in goods upon pledge, the consequence would be, that any pawnbroker, as soon as he got a large quantity of goods into his possession, might discontinue taking in any more, and afterwards commit an act of bankruptcy without being subject to the bankrupt laws. For these reasons I am clearly of opinion, that a pawnbroker is both within the spirit and words of the statute, and that this plaintiff continued to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued.

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 RAWLINSON
 against
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HOLROYD J. I am also of opinion that a pawnbroker is a person subject to the bankrupt laws. Lord Hardwicke's opinion, in *Highmore v. Molloy*, having been delivered within a very few years after the stat. 5 G. 2. c. 30., raises a strong inference that, at that time, pawnbrokers were considered as a species of brokers; and that they, therefore, came within the statute. The 39th section of the stat. 5 G. 2. c. 30. is not merely an enacting clause; but, after reciting "that persons dealing as bankers, brokers, and factors, are

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frequently entrusted with great sums of money, and with goods belonging to other persons," declares the persons coming within that description to be subject to that and the other statutes made concerning bankruptcy. Lord *Hardwicke's* opinion being, that pawnbrokers are a class of brokers, and it appearing by the 39th section of the statute, that brokers are within the provisions of the prior bankrupt laws, I think that a pawnbroker is clearly within the intent of that statute. That being so, then the question is, whether he continued to deal as a pawnbroker at the time when the petitioning creditor's debt accrued. I think that he did continue to deal as a pawnbroker, although he did not continue to deal as such in all the departments of that trade; he continued, however, to sell the pledges, which he was entitled to keep for a particular purpose, viz. that of selling the same, and thereby to derive a greater benefit from the increased interest, by reason of his being a pawnbroker, than he otherwise could by law do. I think that, by continuing to sell these goods with a view to these advantages, he continued to trade as a pawnbroker. For these reasons, I am of opinion that there must be judgment for the defendants.

BEST J. I am of the same opinion. Although the statute 1 *Jac.* 1. c. 21. speaks in contemptuous terms of those persons who carry on the business of pawnbrokers, yet it afterwards calls them brokers; for in the 5th section, it is enacted, "that no sale, exchange, pawn, mortgage of any jewel, pledge, &c. to any broker or brokers, or pawntakers," &c.; and in the 7th section brokers or pawntakers are mentioned. We have, therefore, the authority of the legislature as early as the
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reign of *James* the First, to say, that this description of persons were called brokers; and if they are brokers, and in the course of their business have other men's goods entrusted to their care, they come within the words of the 5 G. 2. c. 30. s. 39. I am, therefore, clearly of opinion, that the plaintiff is a person subject to the bankrupt laws; and I am also of opinion, that he continued to deal as a pawnbroker as long as he did any one act which fell within the range of the business of a pawnbroker. Now, it is part of the business of a pawnbroker to sell the property pledged, if unredeemed, and out of the proceeds to pay himself the amount of the sums he has advanced, and to account for the residue to the person to whom it belongs. During the time he is acting in the character of a pawnbroker, all the legal liabilities belonging to that character attach to him. I think, therefore, that the plaintiff was a broker within the meaning of the stat. 5 G. 2. c. 30. s. 39., and that he continued to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued.

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RAWLINSON
against
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Judgment for the Defendants.

1821.

Thursday,
November 1st.

KNOWLES against HORSFALL and Others.

A., a spirit merchant, sold to *B.*, a wine merchant, several casks of brandy, some of which, at the time of the sale, were in *A.*'s own vaults, and others in the vaults of a regular warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided that this sale had taken place, but no notice of such sale had been given to the warehouse-keeper, with whom some of the casks were deposited. *A.* having become bankrupt while the brandies remained where they were originally deposited, it was held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the 21 Jac. 1. c. 19. s. 11.

TROVER for seventeen pieces of brandy. Plea, not guilty. At the trial, before *Bayley J.*, at the *Lancaster* Summer assizes, 1819, a verdict was found for the plaintiff, subject to the opinion of this Court, on the following case.

The plaintiff was a wine merchant, at *Liverpool*, and the defendants were the assignees of one *W. Dixon*, of *Liverpool*, wine and spirit merchant, who had been duly declared a bankrupt, upon an act of bankruptcy committed the 17th *April*, 1819. *Dixon* bought and imported the brandies in question, being part of a much larger quantity from *France*, several months before his bankruptcy, and upon their arrival, he entered them in his name in the books of the Custom-house and Excise-office at *Liverpool*, and he afterwards bonded them in his name. The brandies, at the time of the action, still remained bonded and entered in his name there. There was no evidence of any express notice having been given by the plaintiff to the excise, of the purchase, and the duties thereon were unpaid. The warehouses in which bonded goods are deposited at *Liverpool*, lie in different parts of the town, and the bonded goods deposited therein on importation are placed under three

locks,

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locks, one of the customs, one of the excise, and one of the owner or occupier of the warehouse; and in cases where the importer has no bonded warehouse of his own, or not sufficient room in it, it is the usual course of trade at *Liverpool* to deposit them in the bonded warehouse of some other person on payment of rent. The brandies imported by *Dixon* were deposited part in vaults occupied by him, at annual rents, and the residue in two bonded vaults of one *Ledson*, a regular warehouse-keeper in *Liverpool*. It was notorious at *Liverpool*, that *Dixon* had rented warehouses, and that renters of warehouses often take in other persons' goods. All these vaults were under the locks before mentioned, but the merchants' keys of the two vaults occupied by *Dixon* were kept by him as occupier of such vaults, until the time of his bankruptcy, and are now in the custody of his assignees. In *February* and *March*, 1819, *Dixon* sold to the plaintiff 52 pieces of brandies lying in the vaults rented by him, and seventeen in *Ledson's*. At the time of each sale, it was agreed, that the brandies should remain in the several warehouses in which they were then deposited rent free, until it suited the convenience of the plaintiff to remove them. Upon each sale, *Dixon* delivered to the plaintiff samples of the respective brandies, the same being part of the bulk, and regular invoices were made out by *Dixon* and delivered to the plaintiff, and the latter paid *Dixon*, before his bankruptcy, for all the brandies, according to such invoices. It was well known in *Liverpool*, that *Dixon* had imported the brandy, and that it was in the above-mentioned warehouses; and it was notorious, that he had rented the warehouses, and it was notorious, in the wine trade, that these sales had been made to *Knowles*. Im-

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KNOWLES
against
HORNFALL.

mediately after each sale, the plaintiff caused the letter K. to be marked in chalk on each of the casks, by his warehouseman, according to his usual custom, in all purchases made by him, which mark remained visible on the casks, until after the time of *Dixon's* bankruptcy. The plaintiff afterwards, and before the bankruptcy of *Dixon*, resampled all the brandies he had purchased of him. The resampling cannot take place, except in the presence of an officer of the excise, to whom the old samples, or a quantity equal to that of the new sample, is delivered up, and by him put back into the bulk, and he then draws out new samples, and delivers them to the person applying; it is not necessary for the persons applying to take the old sample bottles. No entry is made in any book of the name of the person taking fresh samples. The authority upon which the officer of the excise resampled the brandies was an order signed by the plaintiff, but without any authority from *Dixon*. The order for resampling is filed, but the public have no access to the file, nor would the fact of resampling have prevented *Dixon*, or any subsequent purchaser from him, removing the brandies, as, if he had paid the duty, the excise would have delivered them to him. Brandies are always entered in the importer's name, and no change of entry is allowed. The plaintiff, before *Dixon's* bankruptcy, resold 26 pieces of the brandies, part of which were in each of the vaults above mentioned, and which were delivered to the respective purchasers upon such resale; but the orders for the delivery of such of the brandies, so resold by the plaintiff, as were in *Ledson's* vaults, were drawn up by the plaintiff, and signed by *Dixon*, addressed to *Ledson*, for delivery of such a quantity specifically as was mentioned

tioned in each of those orders; and such of them as were lying in *Dixon's* vaults, were delivered by him to the several purchasers, on application by the plaintiff to *Dixon*, without any order. At the time of *Dixon's* bankruptcy, eighteen pieces of the brandies remained undisposed of, whereof seven were lying in *Ledson's* vaults, and eleven in the vaults rented by *Dixon*; but the plaintiff subsequently procured the delivery of one of those in *Ledson's* vaults, upon an indemnity. The brandies deposited in *Ledson's* vaults were entered by him in his book, and still remain in the name of *Dixon*; and it is customary to produce a written order, signed by the person in whose name the brandies stand, before any person can obtain their delivery, and no such order was obtained by the plaintiff as to the brandies in question. At the time of the bankruptcy, the plaintiff could not have got the brandy at *Ledson's* without an order from the bankrupt; and any other person to whom the bankrupt had given an order would have gotten it, and the bankrupt might have delivered the brandies in his own vaults to any one he had pleased. It is the constant custom at *Liverpool*, not to rebond goods on any intermediate change of ownership, nor to remove them out of the bond warehouses in which they were first deposited, until such removal becomes necessary, for the purpose of consumption or exportation; but the bond remains with the excise, in the name of the first importer, till it is cancelled, on the payment of the duties by the proprietor who removes the goods out of bond. The brandies in question were regularly demanded by the plaintiff before the action, and refused to be delivered up by the defendants.

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KNOWLES
against
HORNFALL*Tindal,*

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Tindal. These casks of brandy were not in the possession, order, and disposition of the bankrupt, at the time of the bankruptcy, within the meaning of the 21 *Jac.* 1. c. 19. s. 11., for immediately after each sale to the plaintiff, the latter had a mark, denoting the transfer of the property to him, affixed upon the casks, and that distinguished these brandies from others belonging to *Dixon*. In *Thackthwaite v. Cock* (a), the hops remained undistinguished from the rest of the merchant's stock. Besides, it was notorious to all those carrying on the same trade at *Liverpool*, that such transfer of property had taken place; they were the persons most likely to have dealings with the bankrupt, and, therefore, he was not likely to acquire that false credit by the possession of the goods which the statute was intended to prevent. It was notorious, also, at *Liverpool*, that sales take place whilst the goods are bonded; and it was the custom at *Liverpool*, not to rebond or remove goods out of the warehouse, upon an intermediate change of property, until such removal becomes necessary, for immediate consumption or exportation. A purchaser, who must be taken to be aware of such a custom, had no right to assume, from the fact of the goods having continued in the possession of the bankrupt, that the property had not been changed. In *Flinn v. Matthews* (b), the bankrupt, on the 8th of *July*, had sold a certain quantity of tar, then lying on the quay at *Liverpool*, which tar was to be shipped to *Ireland*, and it was agreed that the tar should be lodged in a warehouse, until the vendee should have an opportunity of shipping it off. The bankrupt placed the tar in a cellar of his own, and became bankrupt in the beginning of *August*. Lord *Hardwicke* was of opinion, that this

(a) 3 *Taunt.* 487.(b) 1 *Atkyns*, 185.

was not a case within the statute, for it was merely a temporary custody, because the vendee had not an opportunity of selling it, by shipping it off immediately to *Ireland*. That case is an authority in point, for here, the bankrupt had only a temporary custody of the goods, viz., until the plaintiff had an opportunity of selling them; and the period that elapsed in this case between the sale to the vendee and the bankruptcy of the vendor, does not much exceed the time that elapsed between those events in *Finn v. Matthews*.

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Parke, contra, was stopped by the Court.

ABERT C. J. I am clearly of opinion that all these brandies were, at the time of the bankruptcy of *Dixon*, in his possession, order, and disposition, by the consent and permission of the true owner, within the meaning of the 21 Jac. 1. c. 19. s. 11. It appears, upon the facts stated, that some of the casks remained in the vaults of *Dixon*, the original seller, and that the others were in the vaults of *Edson*, a warehouse-keeper. As to the latter parcel, if the plaintiff had given notice of the sale to the warehouse-keeper, the latter would not then have been justified in delivering them to any other order than that of the plaintiff, but not having received any such notice, the warehouse-keeper would have been justified in delivering them to the order of *Dixon*, who had placed them there. It is clear, therefore, that that parcel of goods remained after the sale, subject to the order and disposition of the bankrupt. With respect to the brandies which remained in his own vaults, the case is much stronger; because, as to them, *Dixon* united in himself the character of warehouse-keeper and

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and that of merchant or dealer in the commodity. An person who went for the purpose of purchasing the brandies, could not know that *Dixon* did not continue the owner. He had the corporeal power over them. The letter K. marked on the casks might speak a language, to a certain class of persons, intelligible; but to others who might be induced to become the creditors of *Dixon*, in the belief that the brandies belonged to him, it would be wholly unintelligible. If any person of the latter description had purchased them of the bankrupt, I have no doubt that he would have had a good title to them, as against the plaintiff; for the real owner ought not to have left the goods, after the purchase, in the hands of *Dixon*, and suffered him to treat them as his own. For these reasons, I am of opinion, that there must be judgment for the defendants.

BAYLEY J. This is a very clear case. Some of the casks were in the vaults of *Ledson*, and others in vaults rented by *Dixon*. As to the former parcel, it appears that *Ledson* would not deliver them to the order of any other person than that of the bankrupt. Those goods, therefore, were clearly in the possession, order, and disposition of the bankrupt. It was necessary, that something should be done to make the change of property notorious to the public at large, or at least to those persons who were likely to trust the bankrupt, upon the faith of his having the property in these goods. It is not sufficient, that it should be known only to persons in the same trade. Now, as to the brandy which remained with *Ledson*, there was nothing done to make the change of property notorious. The other parcel of brandy remained in *Dixon's* own vaults, so that if any person

person who was not in the wine trade at *Liverpool*, had gone to *Dixon* to purchase it, he would have had the power of selling and delivering it to such person. Now, when the original proprietor of goods continues to have the power of sale and delivery, he has the property in his possession, order, and disposition, within the meaning of the statute.

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BEST J. This case comes directly within all the words of the statute, for here the bankrupt had the possession, order, and disposition of the brandies, with the consent of the true owners. According to the facts stated, the goods would not have been delivered to any other order than his; he therefore had the power of sale and delivery, and that brings the case within the very words of the act of parliament. The case of *Flinn v. Matthews* (a) is distinguishable from the present, because the goods there were to be left in possession of the bankrupt only till they could be conveniently shipt. In this case, the brandies were to remain in the bankrupt's warehouse till the plaintiff could sell them, and they had in fact continued there for a considerable time. It is not sufficient that the sale was known to persons in the wine trade at *Liverpool*. The transfer of the property ought to have been known to all other persons who might, in consequence of the bankrupt's continued possession of it, have been induced to give him credit. In the case of *Thackthwaite v. Cock* (b), it was decided by the Court of Common Pleas, that "a custom that purchasers of hops from hop merchants

(a) 1 *Atkyns*, 185.(b) 3 *Taunt.* 487.

should

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should leave them in the merchant's warehouse for the purpose of resale, upon rent, undistinguished from the merchant's stock, was not such a custom of trade as would prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition." That case is an authority to shew, that the present plaintiff is not entitled to recover, and consequently there must be judgment for the defendant. (a)

Judgment for the defendant.

(a) *Hobroyd J.* was absent at Chambers.

Thursday,
November 1st.

DOE on the Demise of ROBINSON against
ALLSOP.

Where there were two assignments of the same lease of premises within the county of *Middlesex*, and that executed last was registered first: Held, that the deed last registered must, in a court of law, be considered as fraudulent and void, in consequence of 7 Ann. c. 20. s. 1., although the party claiming under the second assignment had full knowledge, when it was executed, of the prior execution of the first assignment.

EJECTMENT to recover certain premises in the parish of *Saint Mary-le-bone*, in the county of *Middlesex*. Plea general issue. The cause was tried before *Abbott C. J.* at the *Westminster* sittings after *Michaelmas* term, 1820, when a verdict was found for the plaintiff, subject to a special case upon the following facts. The demise was laid on the 2d day of *March*, 1818. By lease dated the 30th day of *March*, 1813, the premises in question were demised by *Matthew Wood* to *George Stoddart*, since deceased, for a term of 88 years. This lease was prepared by the then attorney of *Stoddart*, and left by *Stoddart* in his possession. About this time, the plaintiff, *Robinson*, paid

large

large sums of money for, and on account of *Stoddart*, and by his desire also, paid a sum of 13*l.* 14*s.* 6*d.* for, and obtained the possession of the lease from the attorney who had prepared it, and with whom it had been left. On the 29th *October*, 1813, upon a settlement of accounts between *Stoddart* and *Robinson*, *Stoddart* gave to *Robinson* an acceptance for 83*l.* 5*s.*, which was then due to *Robinson*, in addition to the former sum of 13*l.* 14*s.* 6*d.*, and in the month of *February*, 1814, *Robinson* further paid on account of *Stoddart*, 70*l.*, and put into an auctioneer's hands the lease to be sold by public auction. At the sale, no person bidding sufficiently high for the premises, they were bought in, and the lease delivered back to *Robinson*. By indenture of the 25th day of *July*, 1814, in consideration of 190*l.*, *Stoddart* assigned the lease and premises to one *Jeremiah Moore* for all his term therein, but the lease remained in *Robinson's* possession. On the 4th day of *November*, 1815, *Stoddart* was discharged from the King's Bench prison, pursuant to an order of the Court for the relief of insolvent debtors, and, upon his discharge, by indenture bearing date the 4th day of *November*, 1815, assigned all his estate, property, and effects in possession, remainder and reversion, to the provisional assignee of the insolvent debtors' court. This assignment was registered in the register office, in the county of *Middlesex*, on the 7th day of *October*, 1818. In the schedule of the said insolvent's estate, property, and effects, filed in court, and which accompanied the assignment to the provisional assignee of the court, the lessor of the plaintiff, *Robinson*, was stated and returned as a creditor of the insolvent, and the premises in question were stated to have been mortgaged or conveyed,

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against
ALLSON.

1814
Stoddart to Moore

1815 to assign

25th 1818

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against
ALLSOP.

veyed, and then to be in mortgage and conveyed for 60*l.* to a Mr. *Barton Greenwood*, and also to the said *Jeremiah Moore*. On the 19th day of *December*, 1815, *Moore* put the premises up to sale by public auction. The auctioneer had not the original lease, which was at that time in *Robinson's* possession, but *Robinson* knew that he was about to sell the premises, and desired the auctioneer, if they went for a certain price, to buy them in for him. The premises, however, exceeded *Robinson's* price, and they were finally bought by one *William Barton*, and the auctioneer sometime afterwards told *Barton*, that if *Robinson* was paid 30*l.* he would give up the lease, but *Barton* refused. On the 31st day of *July*, 1817, the plaintiff, *Robinson*, as one of the creditors of *Stoddart*, took an assignment from the provisional assignee of *Stoddart*, of all the insolvent's estate and effects, and the 7th *October*, 1818, registered the original lease of the 30th day of *March*, 1813, and also, at the same time, registered the assignment to the provisional assignee, and the assignment from the provisional assignee to him, dated the 31st of *July*, 1817, and brought an ejectment against the then tenant in possession, in *Michaelmas* term, 1819, but was nonsuited by reason of his not being able to prove the discharge of *Stoddart* under the insolvent debtors' act by the regular proof. On the 9th *June*, 1819, *William Barton* assigned the premises to the present defendant, *George Alexander Allsop*, for the term therein, and the plaintiff, *Robinson*, brought the ejectment against the present defendant, who appeared as landlord. The assignments by *Stoddart* to *Moore* of the 25th *July*, 1814, and assignment from *Moore* to *Barton* of the

13th

19th July, 1816, were not registered until the 27th day of February, 1819.

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against
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Holt, for the plaintiff, contended, that a subsequent purchaser for a good consideration, having registered his title first, was to be preferred before the prior purchaser. By 7 *Anne*, c. 20. s. 1., all unregistered conveyances are to be adjudged fraudulent and void against subsequent purchasers for valuable consideration. That is decisive of the case. As to the knowledge of the prior conveyance, it can make no difference at law. All that it can do, is perhaps to entitle the defendant to relief in equity.

Abraham, contra. The object of the act of parliament was to prevent frauds by secret conveyances. That is expressed to be its object in the preamble. Now, in the present case, there is clearly no fraud, for the fact of the existence of the prior conveyance was known to the subsequent purchaser. This, therefore, is not within the mischief intended to be remedied by the act. In *Chenal v. Nichols* (a), this was the view taken by the Court of the act. And in *Worsley v. Demattos* (b), Lord Mansfield puts the case of the subsequent purchaser with the knowledge of a prior unregistered conveyance, as a fraudulent act on the part of the former. He also cited *Le Neve v. Le Neve*. (c)

ARBOTH C. J. A court of law is now called upon for the first time, to put a construction on the words of this

(a) 1 *Ker*. 664.

(b) 1 *Burr* 467.

(c) 3 *Atk.* 646.

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—
Dor dem.
Roxburgh
against
Allson.

statute, by which it is enacted, that every deed or conveyance that shall, after the 29th September, 1709, be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser, or mortgagee, for valuable consideration, unless a memorial thereof be registered before the registering of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim. Now it is impossible, that plainer words could be used, and I think, that, sitting in a court of law, we are bound to give effect to them, and that we cannot say, that this deed is not fraudulent and void within the meaning of this act, because, possibly it may turn out upon examination, that the defendant is entitled to some relief in equity. If there be any such ground, a court of equity may interfere, and this case shews clearly how inconvenient it would be, if this court were to enter into any equitable considerations. For here, it is clear, that the lessor of the plaintiff had at all events a lien on the instrument of conveyance. What effect that might have on a court of equity, I cannot say, but I think it at least is a fit matter for its consideration. We however, in a court of law, must give effect to the words of the act.

BAYLEY J. I am of the same opinion. The words of the statute are, that such deeds or conveyances shall be adjudged fraudulent and void against every subsequent purchaser for valuable consideration. It is to be observed, that the words "bonâ fide purchaser" are not used. I think, therefore, that we are bound in a court of law to give effect to these words. That seems to have been the opinion of the Judges in the cases cited, although they thought that a court of equity would, in

some

SOME cases, interfere to relieve the party. It is so laid down by Lord *Hardwicke*, in *Le Neve v. Le Neve*, and the words of Lord *Mansfield*, in *Doe v. Routledge* (a), are these, "Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside, because he has that notice which the act of parliament intended he should have." He therefore puts it as a case in which equity would interfere; and the circumstances of this case shew the propriety of our adhering to the words of the act; for I am by no means clear that we should not work great injustice, if we were to decide in favour of the defendant.

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Allsop.

BEST J. (b) The words of this statute are quite clear, and in the absence of any case, I should think the plaintiff entitled to judgment. But it seems to me, that the case of *Le Neve v. Le Neve*, in which Lord *Hardwicke* considers the party under these circumstances as entitled to relief in equity, is an authority to shew, that at law he is without defence.

Judgment for the lessor of the plaintiff.

(a) *Crep. 712.*

(b) *Holroyd J.* absent at Chambers.

GOODE and BENNION against HARRISON.
(In Error.)

Friday,
November 2d.

WRIT of error from the Court of Common Pleas, Where an infant held himself out as in partnership with *J. S.*, and continued to act as such till within a short period of his coming of age; but there was no proof of his doing any act as a partner after twenty-one: Held, that it was his duty to notify his disaffirmance of the partnership on arriving at twenty-one; and as he had neglected to do so, that he was responsible to persons who had trusted *J. S.* with goods, subsequently to the infant's attaining twenty-one, on the credit of the partnership.

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recover

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recover the amount of a certain bill of exchange for 187*l.* 12*s.* There were also other counts for goods sold and delivered. The only question made was as to the liability of *Bennion*. At the trial, at the *Lancaster* Summer assizes, 1819, before *Bayley J.*, the counsel for the defendant, *Bennion*, tendered a bill of exceptions to the learned Judge's direction to the jury, which bill of exceptions stated the following facts, viz. that upon the trial the counsel for *Harrison*, to maintain their issue, gave in evidence that *John Goode* and *Bennion*, in *April*, 1818, called upon one *James Fair*, a broker, at *Manchester*; that *Goode* introduced *Bennion* to *Fair* as a friend of his from *Liverpool*, and said, "We want goods:" that *Fair* went with them to *Harrison* and other houses in *Manchester*, and introduced them to *Harrison* as the firm of *Goode* and *Bennion*: that they bought goods of *Harrison* to the amount of 130*l.*, and from several different other persons fifteen parcels, to the amount altogether of 1500*l.*, and *Fair* transmitted copies of the invoices of the goods, directed to *Goode* and *Bennion*, *Liverpool*, some of which were made out to the firm of *Goode* and *Bennion*, others to *John Goode* and *T. Bennion*: that some of the original invoices were seen by them in *Fair's* counting-house, and the goods were forwarded to the address of *Goode* and *Bennion*, and remittances came back: that when *Goode* and *Bennion* were in *Manchester*, in *April*, 1818, *Goode*, in the hearing of *Bennion*, said, that if the goods they then bought would answer the purpose, in a very short time they would have 500 pieces of one sort and 500 of another sort: that after this *Fair* corresponded with the firm of *Goode* and *Bennion*: that in *April*, 1818, *Goode* and *Bennion* had a counting-house in *Liverpool*;

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er pool; that the name of *Goode* appeared on the private door, and remained there till *August*, 1819, but the name of *Bennion* did not appear at all on the counting-house: that *Goode* had been some time in the counting-house before this transaction of *Goode* and *Bennion*, but had not shipped goods before: that in the beginning of *January*, 1819, *Fair* received a letter, in the hand-writing of *Goode*, ordering goods, of which the following is a copy: "*Liverpool, January 4th*, 1819. My dear Sir, Though we have not yet received the promised detained accounts from *America*, we are anxious that all the opportunity of cheap purchasing may not go past. We, therefore, authorize you, if the terms are about the same, to purchase for *N York*, from 800*l.* to 500*l.* of the most saleable articles, to secure which more fully, we wish the greatest extent of credit mentioned in your letter. I am, for *G.* and *B.*, very respectfully, yours, *John Goode.*" That *Fair*, in consequence thereof, bought goods from *Harrison* to the amount of 187*l.* 12*s.*, having no reason to suppose that the connection between *Goode* and *Bennion* was put an end to, and forwarded the goods, and also a bill of parcels for the same, to the direction of *Goode* and *Bennion*, and that on the 16th *January*, 1819, *Harrison* drew a bill of exchange for the amount of those goods upon *Goode* and *Bennion*, which bill of exchange the said *John Goode* accepted in the name of *Goode* and *Bennion*, and which was the bill of exchange mentioned in the first count of the declaration: that *Fair* did not see *Bennion* from the time of his being in *Manchester*, in *April*, 1818, till the month of *February*, 1819, at which time *Bennion* asked *Fair* for the account current of *Goode* and

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Bennion for goods bought when he and *Goode* came to *Manchester*, in *April*, 1818, and said at the same time, that the transaction in *April*, 1818, was the only one that he was engaged in with *Goode*, and that all that account should be paid. That at the time of the purchases in *April*, 1818, *Bennion* did not say, that he was only going to enter into one adventure with *Goode*: that the said goods, so first purchased from the said plaintiff, and others, were paid for before the commencement of the action, and that *Goode* is since become a bankrupt. And the counsel for *Harrison*, to maintain the said issue, further produced, and gave in evidence the bill of exchange, and also a certain letter in the hand-writing of *Bennion*, addressed to *Fair*, as follows: "*Liverpool*, 20th *April*, 1819. Dear Sir, We shall be obliged by your purchasing for our account 100 pieces of the fancied bordered gingham dresses well assorted, and the remaining part of 100% in fancy muslin bordered dresses, well assorted cash prices, and request that they may be sent as soon as possible per waggon. I remain, dear Sir, for *Goode* and self, your's, *T. Bennion*." P. S. Please be very particular in the selection. And thereupon the counsel learned in the law for the said *Thomas Bennion*, in order to support the issue on his part, gave in evidence, that *Bennion* was born on the 29th *May*, 1797. And he also further gave in evidence by one *Riley*, that the said *Riley* was five months in the employ of *Goode*, previously, and at the time of the first purchase, and that he kept the books, and that *Bennion* was never a partner with *Goode* to the knowledge of *Riley*. *Riley* further proved, that he went to *Barbadoes* with

with the goods purchased in *April*, 1818. That he sailed on the 30th *April*, 1818, and returned on the 5th *September*, 1818. That after the 5th *September*, 1818, *Goode* and *Bennion* communicated as private friends, but not in the way of business, and that he, *Riley*, never knew *Bennion's* name to be used in the purchase of goods after *April*, 1818. That whilst *Riley* was absent, he addressed and sent a letter to the said *Goode* and *Bennion* at *Liverpool*, relative to the said goods, so shipped in the name of *Goode* and *Bennion*. That *Riley* sometimes saw *Bennion* at the counting-house, but had no communication with him on business before he went, or after he returned. And the said counsel, for the said *Thomas Bennion*, did then and there insist before the said justice, on behalf of the said *Thomas Bennion*, that the said several matters so produced and given in evidence on the part of the said *Thomas Bennion* as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence, to entitle the said *Thomas Bennion* to a verdict, and to bar the said *James Harrison* of his action against the said *Thomas Bennion*. And the said counsel, for the said *Thomas Bennion*, did then and there pray the said justice, to admit and allow the said matters so produced and given in evidence for the said *Thomas Bennion*, to be conclusive evidence in favour of the said *Thomas Bennion*, to entitle him to a verdict, and to bar the said *James Harrison* of his said action, against the said *Thomas Bennion*, and to direct the jury accordingly. But to this, the said counsel learned in the law of the said *James Harrison*, did then and there insist before the said justice, that the same were not sufficient, nor ought to be admitted or allowed to entitle the said

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Thomas Bennion to a verdict, and to bar the said *James Harrison* of his said action against the said *Thomas Bennion*, and thereupon, the said justice stated his opinion to the jury to be, that a fraud had been committed by the said *John Goode*, and that where one of two innocent parties was to suffer, he ought to do so whose negligence occasioned the loss. That an infant may, in point of fact, be a partner, and sue as a partner on a contract, though he is not liable to the partnership creditors. That in *April*, 1818, the said *Thomas Bennion* held himself out as a partner with the said *John Goode*, and to the said *James Harrison* in particular, and that after he came of age, in *May*, 1818, he should have given notice of his dissent to the said partnership, or that he would be no longer liable as a partner, which he might easily have done. That he knew, he would be supposed by the said *James Harrison* still to continue a partner, and that he was negligent in not putting a stop to that delusion. That if an infant, shortly before he becomes of age, represents himself as a partner, he ought to take care to notify, that he is not so when he comes of age, as he facilitates the commission of a fraud. That though the payment, after the infant came of age, was not sufficient to confirm the partnership, yet as there was in this case an actual partnership between the said *John Goode* and the said *Thomas Bennion*, and inasmuch as the said *Thomas Bennion* might have prevented the said *James Harrison* from being deceived, if he had given notice of his dissent to the partnership, or that he would be no longer liable as a partner, he ought to be liable to the said *James Harrison*, and that in effect, by his omission to do so, he suffered the said *John Goode* to pledge his, the said *Thomas Bennion's* credit

credit to the said *James Harrison* after he came of age, and, with that direction, left the same to the said jury, and the said jury then and there gave their verdict for the said *James Harrison* for, and assessed the aforesaid damages at 188*l.* 18*s.* damages. Whereupon the counsel for the said *Thomas Bennion* excepted to the aforesaid opinion of the said justice, and did insist on the several matters and things aforesaid, as a bar to the said action, and that an infant cannot be a legal partner, and that, when the said *Thomas Bennion* came to the age of 21 years, there was no necessity for him, nor was he bound by the law to give notice of his dissent to the partnership, or that he would be no longer liable as a partner, in order to avoid the liability of a partner. And that, as the said *Thomas Bennion*, in April, 1818, was an infant, he was not a legal partner, and therefore, no notice was necessary to be given by him of his dissent to the partnership, or that he would be no longer liable as a partner, and inasmuch as the said several matters, so produced and given in evidence on the part of the said *Thomas Bennion*, and objected and insisted on as a bar to the said action, do not appear by the record of the verdict aforesaid, the said counsel for the said *Thomas Bennion* did then and there propose their aforesaid exceptions to the opinion of the said justice, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said *Thomas Bennion* as aforesaid, according to the form of the statute in such case made and provided, and thereupon the said justice, &c.

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Littledale, for the plaintiff in error. In this case *Bennion* was not liable: he can only be liable as a partner, not having himself personally interfered in ordering the goods. Now, admitting that what passed with *Fair* at *Manchester* was sufficient to make him liable as a partner, in case he had then been of age, it is clear here that no act has been done by him since his coming of age to affirm the partnership; and the case ought not to have been left to the jury, as if it was the duty of the infant, upon coming of age, to disaffirm the partnership. In *Holmes v. Blagg (a)*, it was a question arising out of a lease. Now, a lease may be for an infant's benefit, and an interest passes by it; and, therefore, it is for him to disaffirm it after he comes of age, or otherwise it will bind him. But a partnership is, in contemplation of law, not for his benefit; and, therefore, if nothing be done after he comes of age to affirm it, it is at an end. An infant cannot be a bankrupt. His trading is not a thing recognized by the law; and it cannot, therefore, be necessary for him to give a regular notice to the creditors that such a trading has been put an end to; nor will the law presume that he commits a fraud in not doing so. In *Jennings v. Rundall (b)*, the infant was held not to be liable; because, although the action was framed in tort, it was in reality founded on a contract. An infant is indeed liable to an action for slander, assault, or any thing connected with crime; but not for any thing founded on a contract. Now, in order to make out the partnership, certain contracts are proved: for each of these acts, separately, the infant is not

(a) 1 B. Moore, 466.

(b) 8 T. R. 335.

responsible. How, then, can the partnership, which is the aggregate of these acts, be binding upon him?

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Parke, contra. The case does not go on the ground of any supposed continuance of the contract of partnership between *Goode* and *Bennion*, after the latter came of age, but is founded on grounds altogether distinct. Here, *Bennion* permitted himself to be held out to the world as a partner, and so induced persons to believe that *Goode* had authority to bind him; and there are many cases depending upon the principle, that where an individual chooses so to act, he makes himself responsible. In *Monk v. Clayton (a)*, the act of a servant, though out of place, was held to bind the master, by reason of the former credit given him by his master's service; and the same principle applies to the present case. Here, the infant was introduced as a partner; and the conversation with *Fair*, and his own letter, dated 20th April, 1819, are abundantly sufficient to shew, that up to a very short period before his coming of age, he represented himself as a partner. He must, therefore, be held responsible, upon the principle, that where one of two innocent parties is to suffer by the fraud of a third, he ought to suffer who has been the cause why the credit has been given.

Littledale, in reply. The case of master and servant is distinguishable. There, the master had originally power to authorize the servant to contract; but the infant never could give such authority to his partner, In *Viner's Abridgment*, tit. *Enfant*, H. 2. pl. 16., it is

(a) Cited in 10 Mod. 110.

thus

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thus laid down, "Case lies not against an infant for affirming himself to be of age, and thereby borrowing money of the plaintiffs; and a distinction was taken between torts and contracts of infants; for though infants shall not be bound by contracts, yet they shall be bound for torts. But, *per Curiam*, though infants shall be bound by actual torts, as trespasses which are *vi et contra pacem*, yet they shall not be bound by those which sound in deceit." That is, therefore, a direct authority in point.

ABBOTT C. J. I am of opinion that, in the present case, the judgment ought to be affirmed. By the bill of exceptions, it appears, that at the trial it was insisted that the matters given in evidence were conclusive, and ought to have entitled the defendant to a verdict; and that the learned Judge should have directed the jury accordingly. The question now is, if the evidence so proved was conclusive, and if the learned Judge ought so to have informed the jury? I think the evidence was not conclusive, and that it was not the duty of the learned Judge so to have informed the jury. No doubt *Bennion*, whilst under 21, had been a partner, and had held himself out as such to many persons, and amongst others, to the plaintiff. Upon his coming of age, he does nothing. He indeed ceases to act as a partner, or to purchase goods; but he gives no notice to any body that he has so ceased. Then, it is insisted in his behalf, that as all he did in the character of a partner was done in his infancy, this was not necessary; and that he is not liable, unless it be affirmatively shewn that he was a partner with *Goode* after he came of age. But a person may be sued as a partner who never was in reality a part-

partner. If once a person holds himself out as being a partner, till he gives notice that he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership may consider him as such, and he is bound by that representation. It is not necessary in fact, or in law, that to create a legal obligation a partnership should be still continuing. The legal obligation may arise from the acts of the party at one time, and his forbearance at another time. Here, during infancy, the defendant acts as a partner, and when he comes of age he forbears to inform the world that he was not so. Then the question is, if the Judge ought to tell the jury that it was a matter upon which they were to deliberate? I think the learned Judge acted most correctly in leaving it to their decision, and leaving it with a strong intimation of his opinion against the claim of exemption set up by the defendant. The judgment, therefore, of the Court of Common Pleas at *Lancaster* must be affirmed.

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BAYLEY J. If I had seen any ground for changing the opinion I delivered at the time of the trial, I should be very glad in having the opportunity to correct it now; but, in this case, I still think the present plaintiff entitled to recover, and that the infancy of *Bennion* was no bar to the action. It is clear that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy; but still he may be a partner. If he is, in point of fact, a partner during his infancy, he may, when he comes of age, elect if he will continue that partnership or not. If he continues the partnership, he will then be liable as a partner; if he dissolve the partnership, and if, when of age, he takes
the

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the proper means to let the world know that the partnership is dissolved, then he will cease to be a partner. But the foundation of my opinion is the negligence of *Bennison* at the time he became of age. Suppose an infant is not really a partner, and that, during his infancy, he never in fact enters into any joint purchase, but that he holds out to different people, "I am a partner with *A. B.*," and then comes of age. Suppose, also, that the person to whom he made the representation furnishes *A. B.* with goods, *A. B.* representing himself to be a partner with the infant, and the latter having done nothing to correct the mistake and apprehension in the mind of the seller of those goods, I should think, in such a case as that, the infant, the person who, when he was an infant, had represented himself as being a partner with *A. B.*, would, by suffering that delusion to continue when he became of age, and neglecting to set the matter right, be liable to all those persons upon whom the delusion operated. That is the justice, and, as it seems to me, the law of the case. It would be very hard if the persons who had sold the goods should not have the benefit of the credit pledged; and the individual, when he came of age, may protect himself from the consequence of that misrepresentation by giving notice to all the persons to whom he has made the false representation. For these reasons, I think the judgment ought to be affirmed.

HOLROYD J. I think, also, that the judgment ought to be affirmed. Although an infant, entering into partnership with other persons, is not responsible for the debts contracted during his infancy, while he is so a part-

partner; yet he may by law be a partner, and be entitled to all the benefits resulting from the partnership, though he will not be liable for the losses, if he chooses to take advantage of his infancy. Here, a partnership was formed; and it appears by the letter of the 20th of April, 1818, written by the defendant himself, that that partnership continued up to that time, which was within a very short period of his attaining the age of 21. There was, I think, sufficient evidence for the jury to draw the conclusion that the partnership continued until he came of age: and if there was a partnership continuing when he came of age, that partnership must be taken still to have continued till something was done to dissolve it; and no notice being given by the infant to dissolve the partnership, all the consequences of law result from it, one of which is, that a partner of age is responsible for all the debts contracted by the firm after he came of age. I think that the defendant is liable, and that the judgment ought to be affirmed.

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 Harrison.

BEST J. I am of the same opinion; and I think that the direction of the learned Judge was perfectly correct. The fallacy of Mr. *Littledale's* argument, I think, arises from this circumstance: he considers the contract of an infant as absolutely void from the beginning. But it is not void; for if void, the infant himself could take no advantage of it. It has however been decided that an infant may be a partner, and may take advantage of a partnership contract. Here, the infant, by holding himself out as a partner, contracted a continual obligation; and that obligation remains till he thinks proper to put an end to it. He continued that obligation when he became of age,

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age, when he became capable of managing his own concerns; and if he wished to be understood as no longer continuing as a partner, he ought to have notified it to the world. Not having done so, I think that contract, which ~~was~~ voidable only in the first instance, became absolute as against him. I am of opinion that when he, in the month of *April*, had distinctly stated to the person to whom that letter was written, that he was not a partner in a particular transaction, but a general partner, and directed goods to be purchased for the concern, the world had a right to take him to be a partner till he thought proper to put an end to it; and if, after he became of age, he allowed that delusion to go on, inducing the world to believe that the partnership was continuing, he must, like every other man, take the consequence. It seems to me, on the principles of honesty as well as by the rules of law, this judgment ought to be affirmed.

Judgment affirmed.

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PHILLIPS and Another *against* BARBER.Friday,
November 2d.

DECLARATION on a policy of insurance, in the usual form, on the ship *Susannah*, for twelve months from the 20th *February*, 1820, to the 19th *February*, 1821, both days inclusive, *at sea and in port*. The loss was alleged in the first count of the declaration as follows: And the said plaintiffs further say, that heretofore and during the continuance of the risks in the said writing or policy of insurance mentioned, and thereby insured against, to wit, on the 1st day of *October*, 1820, aforesaid, the said ship arrived at the harbour of the city of *St. John*, in the province of *New Brunswick*, and then and there discharged a certain cargo, with which the same was then stored, and loaded, and thereupon it then and there became necessary to take and place, and the said ship was then and there accordingly taken and placed in a certain graving-dock there, in order that the same might be repaired and amended, and rendered fit to proceed on her then intended voyage. And the said plaintiffs further say, that the said ship was then and there placed near to a certain wharf in the said graving-dock, and that afterwards, and during the continuance of the risks in the said policy of insurance mentioned, to wit, on, &c., and whilst the said ship was lying against the said graving-wharf, so placed there as aforesaid, the same, by the violence of the wind and weather, was with great force and violence blown over on her side, whereby the said

Where; in an action on a policy of insurance on ship, in the usual form, for twelve months, at sea and in port, the loss averred was as follows; that the ship having arrived at the harbour of *St. J.*, and discharged her cargo, it became necessary to place her, and she was accordingly placed, in a graving-dock, there to be repaired, and near to a certain wharf in the graving-dock; and that, whilst she was there, by the violence of the wind and weather she was thrown over on her side, whereby she struck the ground with great violence, and was bilged, &c.: Held, that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes, &c." for which the underwriters were liable.

Held, also, that the above facts, with the additional circumstance of there being two or three feet water in the graving-dock when the accident happened, did not amount to a loss by perils of the sea.

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ship was thrown upon and struck the ground with great violence, and thereby, then and there was bilged, straited, shattered, and greatly injured, damaged, broken, and spoiled, and it, thereupon, then and there became expedient and necessary to sell and dispose of the said ship, and same was then and there accordingly sold at the said port of *St. John* aforesaid, and by means of the premises aforesaid, the said *Daniel Phillips* sustained an average loss, to wit, an average loss of 76*l.* 6*s.* 6*d.* upon and in respect of the said ship, to wit, at, &c., and thereby, and according to the form and effect of the said policy of insurance, and his promise and undertaking, the said defendant then and there became liable to pay and ought to have paid to the said plaintiffs a certain sum of money, to wit, the sum of 84*l.* 18*s.* 6*d.* of like lawful money, being his the said defendant's proportion of the said average loss for and in respect of the said sum of 100*l.*, so by him insured as aforesaid. The second count alleged the loss by perils of the sea generally. To the first count, the defendant demurred specially, assigning for cause of demurrer, that it was not stated that the ship was at sea or in port when the loss thereof happened, and that the nature of the said graving-dock was not stated, nor did it appear whether, at the time of the loss, the ship was in the water or on dry ground, nor that the loss happened from any peril insured against by the policy, nor that the said ship might not have been repaired at the said city of *St. John*, nor how it was necessary to sell the same, nor how much the sale thereof produced, and that the loss, as stated, was in its nature not an average but a total loss, with benefit of salvage to the underwriters, and was alleged without sufficient certainty and

pre-

precision. And as to the other count, he pleaded the general issue.

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Campbell, in support of the demurrer. This was not a loss for which the underwriters were liable, being a mere accident, happening to the ship whilst under repairs. The loss is clearly not one of the perils enumerated in the policy. Nor will the general words at the end be sufficient to include the case; for those words apply only to perils ejusdem generis with those enumerated. Suppose the ship damaged by worms, or that rats made holes in the bottom, and so the loss happened: it is clear, that in such cases, the underwriters would not be liable. In *Thompson v. Whitmore (a)*, the loss alleged in the declaration was by the waves, winds, and perils of the sea. And, in truth, the waves there actually caused the loss; for they washed away the supports of the vessel, in consequence of which she was damaged. But the Court there held it not to be a loss by perils of the sea. On that occasion; the case of *Rowcroft v. Dithmore* was cited and relied on, where Lord *Kenyon* held, that a loss occasioned by the ship's not being able, when hoisted down, to bear the strain, and in consequence, being drawn on the land, where she bilged, was not a loss by perils of the sea. He also cited *Pelly v. The Royal Exchange Assurance Company. (b)* Besides, it is not distinctly alleged that this loss happened in port.

Chitty, contra, was stopped by the Court.

ABBOTT C. J. I am of opinion, that the plaintiff is entitled to recover. In this case he has not entangled

(a) 5 Taunt. 227.

(b) 1 Burr. 341.

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himself by any particular allegation, but has shewn fully the manner, time, and place of the loss. This, it is to be observed, was a policy upon the ship for time, at sea and in port. Now, the loss stated in the declaration was, that after the ship had discharged her cargo at the harbour of *St. John*, she was then and there placed in a certain graving-dock there, for the purpose of repair, near to a certain wharf, and that whilst she was lying there, she was, by the violence of the wind and weather, blown over on her side, and damaged, so that it became necessary to sell her. Now, I think that it is clearly alleged that this was a loss happening in port. And then the question will be, whether it is a loss falling within any of the perils insured against. Now, the perils insured against are of the seas, men of war, fire, &c., and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship. These general words are, indeed, restrained in construction to perils ejusdem generis with those more particularly enumerated in the policy. In this case, however, the loss was occasioned by the violence of the wind and weather in port; and it seems to me, therefore, to have been produced by a peril ejusdem generis with those specified, and to fall within the general words of the policy. There must, therefore, be judgment for the plaintiff.

Judgment for the Plaintiff.

On the first day of term, *Scarlett* moved to enter a verdict for the plaintiff on the second count, averring a loss by the perils of the sea. The facts given in evidence at the trial were the same as those stated in the first count of the declaration, with the addition, that there was between two and three feet depth of water in

in the graving-dock at the time the ship was blown over. He cited *Fletcher v. Inglis*, (a) as an authority in point. But the Court were of opinion, that this was not a loss by the perils of the sea; and they added, that the case cited was clearly distinguishable; for the ship there was in the ordinary course of her voyage when the damage happened, which was not the case here.

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Rule refused,

(a) 2 B. & A., 315.

MURRAY against KING.

Friday,
November 2d.

DEBT on bond. The defendant craved oyer of the bond and condition, which recited, that *W. B. Tufnell* and the defendant had delivered and indorsed to the plaintiff (who had discounted the same) a bill of exchange, drawn by *Tufnell* on, and accepted by, one *Tyrell*, dated *January 14th, 1819*, for the sum of *1300*l.**, payable 12 months after date, for value received, and payable to *Tufnell*, or his order; and it then provided, that if *Tufnell* and the defendant, or either of them, their heirs, &c. should pay or cause to be paid to the plaintiff, his executors, &c. the said sum of *1300*l.**, within one month after the said bill of exchange should become due and payable as aforesaid, in case the said sum of *1300*l.** should not be then paid by *Tyrell* to the

The condition of a bond, after reciting that defendant and *J. S.* had delivered and indorsed to the plaintiff a bill of exchange, drawn by *J. S.* and accepted by *A. B.*, was, that defendant and *J. S.*, or either of them, their heirs, &c. should pay, or cause to be paid, to the plaintiff, his executors, &c. the sum secured by the bill, within one month after it should become due and pay-

able, in case it should not be then paid by the acceptor, to the plaintiff, his executors, &c., according to the tenor of the said bill, together with interest from the time the bill became due: Held, that to an action on this bond, it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and *J. S.*, or either of them.

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plaintiff,

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plaintiff, his executors, &c. according to the tenor of the said bill of exchange, together with interest for the same from the time that the said bill of exchange should have become due and payable, then the obligation should be void, &c. The defendant pleaded, first, non est factum; secondly and thirdly, that the bond was given for an usurious consideration, upon which pleas issues were joined; and, fourthly, that the plaintiff, when the bill of exchange in the bond mentioned became due and payable, did not duly present, or cause to be presented, the said bill of exchange to *Tyrell*, for payment thereof, according to the usage and custom of merchants, but wholly neglected to present the said bill for payment for a great and considerable time, to wit, until one month had elapsed after the said bill of exchange became due and payable, according to the tenor thereof; and, fifthly, that after the bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. the said bill was presented to *Tyrell* for payment thereof, and payment required, but that *Tyrell* neglected and refused to pay the same, and that the plaintiff did not give, or cause to be given, notice of the non-payment of the bill to the defendant, or to *Tufnell*, in a reasonable time after the bill became due. To the fourth plea, the plaintiff replied, that the acceptance of the bill of exchange by *Tyrell* was a forgery; and that the defendant and *Tufnell*, long before the said bill of exchange became due, to wit, on, &c. well knew that it was so; and that, by reason of the premises, the said bill of exchange was not presented and shewn to *Tyrell* for payment thereof, and payment of the said sum of money therein specified

was

was not required. There was a similar replication to the fifth plea. To these replications, the defendant rejoined, that he did not, before the said bill of exchange became due and payable, know of the forgery of *Tyrell's* acceptance. Demurrer and joinder.

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Campbell, in support of the demurrer. The pleas are insufficient; for they do not allege that the condition of the bond has been performed, but, on the contrary, admit that it has been broken. The only qualification in the condition is, in case the sum of 1300*l.* shall not be paid within one month after the bill of exchange shall become due. The contract therefore was, that the acceptor should have a month to pay the bill: and if then not paid, that the ~~obligor~~ of the bond would pay it. It is clear that it was competent for the parties to waive the necessity of any presentment, which, in fact, they have done. If, indeed, it had been a special acceptance, perhaps the words, according to the tenor of the said bill, might have required a presentment; but it does not appear that this was so. The pleas only state non-presentment; they do not say due diligence was not used, or that the drawer or indorsers were thereby discharged, which ought, at all events, to have been done. The case of *Warrington v. Furber* (a) is a direct authority for the plaintiff.

obligor

Chitty, contra. The authority of *Warrington v. Furber* is doubtful, after the case of *Philips v. Astling* (b), which, to a great extent, overruled it. Here, the obligees are bound to pay the bill, in case it be not paid by the ac-

(a) 3 East, 242.

(b) 2 Taunt. 206.

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ceptor, according to the tenor and effect of the said bill of exchange. Now, those words include the necessity of presentment; for they shew that the ordinary course of mercantile dealings is to be followed; and part of that course is, to present the bill for payment to the acceptor, and, in case of dishonour, to give notice to the other parties to the bill. How is the acceptor to pay it, unless it be presented to him? For he cannot tell who is the holder, till it is so presented. The pleas, therefore, are sufficient.

ABBOTT, C. J. I am of opinion that the plaintiff is entitled to recover. Here, the condition, after reciting that *Tufnell* and the defendant had delivered and indorsed to *Murray* a bill of exchange, drawn by *Tufnell* and accepted by *Tyrell*, provided, that the bond shall be void in case they, or either of them, should pay the amount of the bill within one month after it became due, in case it should not be then paid by the acceptor. Now, all this, in substance, amounts to an undertaking to pay the bill, with interest, within one month after it was due, if not then paid by the acceptor. It is admitted that that month had elapsed, and that it has not been paid by the acceptor, according to the condition of the bond; therefore the defendants are answerable. It is, however, contended by the defendant's plea, that we are to engraft upon this bond those limitations which the law imposes upon the holders of bills of exchange, namely, a due presentment to the acceptor, and a notice of dishonour to the drawer and indorser. I am of opinion that we ought not so to do. I do not rely on the case of *Warrington v. Furber* (a); because that case

(a) 8 East, 242.

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King.

has been broken in upon by the case of *Philips v. Astling*. But there is a main distinction between those cases and the present; for, in both of them, the guaranties were given by persons not interested as parties to the original instrument. But, here, the bond is given by *Tufnell* and the defendant, who were both parties to the bill. Now, in that character, if no bond had been given, it is clear they would have been liable, in case the formalities stated in the pleas had been complied with; and if the only object of the bond had been to give the plaintiff a security of a higher nature, and to make the party liable in case those formalities had been complied with, I think we should have found it so expressed in the condition; and not finding that, I therefore conclude that the parties meant to engage to pay the bill at all events, as sureties for the acceptor, in case he did not pay it; and if so, it is clear that the pleas are insufficient, and, therefore, there must be judgment for the plaintiff.

BAYLEY J. I have had considerable doubts in the course of this argument; but my mind has at length come to the conclusion that the pleas are bad, and that the plaintiff is, therefore, entitled to recover. In this case, *Tufnell* and *King* were the drawer and indorser of the bill of exchange; and the condition is, that if the bill be not paid when due, for the payment of which by the acceptor they have become sureties, they would pay, or cause to be paid, the bill within one month after it became due, and was not paid by the acceptor. It is, therefore, conditioned for their own acts, in case of a given event, namely, the non-payment by the acceptor. Now, the acceptor has not paid the bill in money, nor have *Tufnell* and *King* done so. The bond, therefore, is for-

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forfeited, unless the neglect to present the bill to the acceptor, and the want of notice to the other parties, be considered by the Court as an equivalent to actual payment. Now, I think this was not the intention of the parties to this bond. If no bond had been given, laches on the part of the holder would have exonerated *Tufnell* and the defendant; and one object of the bond might, therefore, have been to exonerate the plaintiff from such a risk. It was very easy for *Tufnell* and *King* to ascertain, by enquiry, whether *Tyrell* had paid the bill; and I think the fair meaning of the words in this condition was, to throw upon them this obligation.

HOLROYD J. I think that the pleas are bad. By the condition of the bond, it appears that it was given by persons who were parties to the original instrument, and who would have been answerable, independently of the bond, in case the custom of merchants had been properly acted upon, namely, by a due presentment and notice of dishonour. Under these circumstances, the bond was executed; and the only event specified in the condition, upon which the money was to be paid by *Tufnell* and the defendant, is, in case the money is not paid by the acceptor, according to the tenor of the bill. Now, non-payment by the acceptor, even without presentment, is non-payment, according to the tenor of the bill; for a presentment is not a material ingredient to entitle a party to maintain an action against the acceptor. He may, perhaps, plead as a defence, that he was always ready to pay the bill, and that as soon as he knew who was the holder of it, he tendered the money; but a plea, that the bill was not presented to him, would be no discharge. Here, *Tufnell* and the defendant, in
case

case no bond had been executed, would have been discharged by the want of notice of dishonour. The condition, however, is totally silent as to notice, as the only event there mentioned is non-payment by the acceptor. I am of opinion, that here there was no payment by the acceptor, either in fact or in law; and, therefore, that the defendant still remains liable on the bond.

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BENT J. concurred.

Judgment for the plaintiff.

WALKER against MAITLAND.

Saturday,
November 3d.

A RULE nisi having been obtained, in *Hilary* term last, for setting aside the award in this case, the Court, on cause being shewn, ordered the award to be stated in a case for their opinion. The material facts stated on the face of the award were the following: The plaintiff, being owner of the ship *Britannia*, by a charter-party, bearing date the 5th day of *October*, 1818, chartered her to *James Wildman* to proceed to the *West Indies*, there to load a cargo of colonial produce, and to bring home the same to this country. By the usage of trade in that behalf, the risk of bringing colonial produce in the *West Indies* from shore to the ships in which the same is to be conveyed home to *England*, is borne by the owners of ships, unless specifically agreed to the contrary. The plaintiff, to indemnify himself against such risk, with respect to loading the *Britannia* in the said voyage, on the 24th *April*, 1819, effected a policy

The underwriters on a policy of insurance are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners.

of

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of insurance in the common printed form on boats belonging to the ship *Britannia*, and on produce in said boats, or in any other craft employed in loading the ship during her stay at *St. Kitts*. The defendant, by his agent, subscribed the policy for 200*l*. The ship *Britannia* arrived at *St. Kitts*, on the said voyage, on the 6th day of *January*, 1819. She was manned with a competent crew, had they conducted themselves with propriety, and done their duty in loading the ship. On the 16th day of *April*, 1819, while the ship lay at *St. Kitts* to take in her cargo, a certain sloop, called the *Vigilant*, was employed as a craft on behalf of the said plaintiff, to bring produce from a place in the island called *Red Flag Bay* to the ship, then lying at the distance of fifteen miles therefrom. The sloop having received a full loading of sugar, to be carried on board the ship, proceeded from *Red Flag Bay* about six in the morning for the ship, in charge of the chief mate and three seamen belonging to the ship, and four negroes, labourers. The sloop was sufficiently manned; and if the mate and the other persons had done their duty, the sloop, with the produce on board thereof, would have safely reached the ship. About eight in the evening the mate lay down to sleep, leaving the charge of the watch to one of the seamen; another having the helm; and soon after the mate went to sleep, the whole of the watch on duty went to sleep also. The sloop being left to herself, ran ashore, and was beat to pieces, whereby part of her loading was lost, and the residue damaged. The loss arose and happened from the misconduct and negligence of the persons so on board the sloop. On the 17th *April*, while the ship was at *St. Kitts*, for the purpose

purpose aforesaid, four seamen of the ship were sent ashore by the master in the long boat of the ship to bring on board a hogshead of sugar, then lying on the beach, and, having put the hogshead of sugar into the boat, by their mismanagement the boat was driven on the beach and wrecked, and the hogshead of sugar was entirely washed out. If the boat's crew had done their duty, the boat would have safely reached the ship with the hogshead of sugar; and the loss thereof arose from the misconduct and negligence of the boat's crew. Upon these facts the arbitrators awarded in favour of the plaintiff.

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Campbell, for the plaintiff, relied upon *Busk v. The Royal Exchange Assurance Company* as an authority in point. (a)

Pollock, contra. Here the loss has happened in consequence of the negligence of the crew, who are the servants of the plaintiff, and not by perils of the sea. This is, therefore, in point of law, a loss happening from the negligence of the assured himself; and, therefore, the underwriters are not liable. In *Gregson v. Gilbert* (b), it was held, that where a loss happened by a mistake of the master, it could not be considered a loss by perils of the sea. And *Buller v. Fisher* (c) is to the same effect. In this case, too, there was a breach of the implied warranty to provide a master and crew of competent skill. For here they were not sufficiently

(a) 2 B. & A. 73.

(b) *Marshall on Insurance*, 690.

(c) 3 Esp. 67.

vigilant,

1821. vigilant; and, in consequence of that, the loss happened. *Tait v. Levi.* (a)

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ABBOTT C. J. I am of opinion that the plaintiff is entitled to recover. The subject of this insurance was very special; it was on boats belonging to the ship *Britannia*, and on produce in the said boats, or in any other craft employed in loading the ship during her stay at *St. Kitts*. No doubt the owner, under this policy, expected to be indemnified against the loss in question. The words of the policy are very large, and, although it may appear extraordinary, that the underwriters should undertake to indemnify the assured against the negligence of the master and crew, which is a species of misconduct on their part, yet it is clear, that they do so in the case of barratry, which is the highest species of misconduct of which the master and crew can be guilty. In this case, the immediate cause of the loss was the violence of the winds and waves. No decision can be cited, where, in such a case, the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule; it will introduce an infinite number of questions, as to the quantum of care which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy, in that case it might be argued, as here, that the loss was imputable to the neg-

(a) 14 *East*, 481.

ligence of one of the crew, and that the underwriters were not liable. These, and a variety of other such questions would be introduced, in case our opinion were in favour of the underwriters. I cannot distinguish this case from that of *Busk v. The Royal Exchange Assurance Company*; there, the immediate cause of the loss was fire, produced by the negligence of one of the crew; yet the underwriters were held to be liable. Here, the winds and waves caused the loss, but they would not have produced that effect, unless there had been neglect on the part of the crew. I think that the underwriters are liable for the loss that has arisen in this case.

BAYLEY J. Here, the loss arose from the sloop with the goods on board having been beat to pieces by the force of the winds and waves; and the question in this case is, whether the underwriters are exonerated from the loss, by proving negligence on the part of the crew, although the damage was occasioned by the perils of the sea. It is the duty of the owner to have the ship properly equipped, and for that purpose, it is necessary that he should provide a competent master and crew in the first instance; but having done that, he has discharged his duty, and is not responsible for their negligence, as between him and the underwriters. If that were not considered to be the law, the question must have frequently arisen, whether there had been proper care and attention by the master and mariners. It is now, however, raised almost for the first time. I am of opinion, that in this case the underwriters are liable.

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HOLROYD J. The rule of law is, that *proxima causa non remota spectatur*, and here the proximate cause of the loss was the peril of the sea. The question is, whether the underwriters are liable for a loss proceeding directly from a peril of the sea, but remotely from the negligence of the crew. The underwriters engage to be responsible for the barratry of the master; they therefore engage to be responsible for the highest species of misconduct. This case cannot be put on the ground of the breach of the implied warranty to provide a master and crew of competent skill. It is sufficient, if the owners provide a master and crew generally competent; there is no implied warranty that such a crew shall not be guilty of negligence. I therefore agree with the rest of the Court, that the rule for setting aside the award must be discharged.

Rule discharged. (a)

(a) *Best J. was absent at Chambers.*

Saturday,
November 3d.

The KING against The Inhabitants of
HARDWICK.

A pauper, being eighteen years of age, and residing with his father, was drawn as a militia man, and served for five years as a ballotted man. During his service, he several times, when on

furlough, and, finally, after his discharge from the militia, returned to his father's house: Held, that by his so remaining separated from his father's family after twenty-one, he was emancipated, although the original separation was not voluntary on his part.

TWO justices by their order, removed *John Hinton*, his wife and child, from the parish of *Stanton Harcourt*, in the county of *Oxford*, to the parish of *Hardwick* in the same county. The sessions confirmed the order, subject to the opinion of this Court on the following case. The pauper was born in the parish of *Hard-*

wick,

wick, and resided there as a part of the family of his father, who was a settled inhabitant of that parish. In the year 1817, when the pauper was 18 years of age, he was drawn for the *Oxfordshire* militia, and served therein for five years as a ballotted man; the regiment during the whole of that period, being embodied and in actual service. He joined the regiment in 1808, and in the year 1809, having obtained a furlough for three weeks, he returned to the house of his father, who was still residing at *Hardwick*, and lived with him for about a fortnight. In the year 1811, the pauper obtained a second furlough for a fortnight, and went again to his father's, who had removed to, and was then residing in the parish of *Stanton Harcourt*, where he remained for about twelve days. The pauper was discharged from the militia in the year 1813, when he returned to his father in *Stanton Harcourt*, who gave him lodgings in his house till his marriage. After the pauper's return from the militia, and before his marriage, his father gained a settlement in *Stanton Harcourt*.

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Cross, in support of the order of sessions. The pauper by remaining after twenty-one, separated from his father's family, became emancipated: *Rex v. Cow-horseborne* (a), *Rex v. Roach*. (b) And consequently the subsequent settlement of his father was not communicated to him. He was then stopped by the Court.

Bligh, contra. All the cases which have hitherto been determined on the subject, as to the emancipation by separation, are cases in which the separation was volun-

(a) 10 *East*, 88.(b) 6 *T. R.* 247.

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The King
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ants of
Hardwick.

tary at first on the part of the child. That was so in *Rex v. Cowhoneyborne*, and in *Rex v. Roach* there is this distinction also, that there the separation commenced after the child attained twenty-one. Those cases, therefore, do not go so far as the present. In *Rex v. Walpole St. Peters* (a), and in *Rex v. Stanwix* (b), which are more similar, the distinction is, that there the paupers voluntarily enlisted as soldiers. But here, the original separation was under the controul of the law, by the pauper being ballotted as a militia man. This therefore is like the case of an arrest before twenty-one and continuance in prison till after, under which circumstances it could not surely be contended that the pauper would be emancipated. In *Rex v. Broadhembury* (c), a separation by force of law in a workhouse was held no emancipation, and *Rex v. Woburn* (d) shews, that the circumstance of being in the militia is not alone an emancipation. The original separation being therefore in this case compulsory, the pauper's settlement will follow that subsequently gained by his father, and the order of sessions is therefore wrong.

ABBOTT C. J. The rule of law is, that every new settlement acquired by the parent is communicated to the children so long as they remain members of his family; and the question in this case is, whether at the time when the father gained his settlement in *Stanton Harcourt*, this pauper remained a member of his family. Now, during the minority of the child, he will remain almost under any circumstances unemancipated; but

(a) *Burr. S. C.* 658.(b) 5 *T. R.* 670.(c) 2 *Roll.* 39.(d) 8 *T. R.* 479.

where

where the new settlement is acquired by the parent after the child has attained twenty-one, it will not be communicated unless in fact the child continues part of the family. Where therefore, at that period he is absent, employed in gaining a livelihood for himself, or serving as in this case, in the militia, I think he no longer remains a member of the family. In the present case, I think that the sessions have come to a right conclusion, in deciding that the last legal settlement of the pauper was at *Hardwick*.

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ants of
HARDWICK.

BAYLEY J. I am of the same opinion. If a child be separated from his father's family, and does not return till after twenty-one, he ceases to be a member of that family, and consequently his settlement will not after twenty-one, shift with that of his father. I think, therefore, that the sessions are right, and that this case is hardly distinguishable from *Rex v. Walpole St. Peter's*.

HOLROYD J. I am of the same opinion. The distinction between a compulsory and a voluntary separation seems to me to be immaterial. The case must follow the same rule as *Rex v. Walpole St. Peter's*.

Order of sessions confirmed. (a)

(a) Best J. was absent at Chambers.

1821.

Saturday,
November 2d.The KING *against* SEVILLE and Others.

A constable apprehended an offender for a misdemeanor committed in his presence in a place of religious worship, and carried him before a magistrate, and was bound over by recognizance to prosecute him for the offence : Held, that the expences of such a prosecution were not monies expended by him in doing the business of his township, and that he could not charge them in his accounts under 18 G. 3. c. 19. s. 4.

THIS was an appeal by the defendants, who were overseers of the poor of the township of *Quick*, in the West Riding of *Yorkshire*, against the accounts of *John Robinson*, late constable of that township. At the trial it appeared, that on a *Sunday*, in the month of *December*, 1819, a person of the name of *William Whitehead*, being in a state of intoxication, met a young woman on the road, and on his attempting to take liberties with her, she made her escape from him, and took refuge in the chapel, where divine service was just beginning ; he followed her and behaved in an unbecoming and rude manner. In consequence of which he was taken into custody by the constable, (who was then in the chapel,) and the chapel-warden, and was the next day by them taken before a magistrate ; and they were both bound by recognizance, to prosecute him at the next *Wakefield Sessions* for a misdemeanor, which they accordingly did ; and he was found guilty, and punished by six months imprisonment. No notice was ever given to the overseers or other inhabitants, that the prosecution was intended to be carried on at the expence of the township, nor was it mentioned or approved of, at any meeting of the inhabitants. The sessions at *Wakefield*, where the indictment against *Whitehead* was tried, were held in the month of *January*, 1820, and in the *March* following, the constable regularly, and in the way pointed out by the act 18 Geo. 3. c. 19., presented his accounts of the expenses incurred by him in the dis-
charge

charge of his office as constable; the whole of which were allowed, except the item of 18*l.* for the expenses incurred in the prosecution of *Whitehead*, the allowance of which was negated by a large majority of the meeting of the inhabitants, held for the purpose of investigating them, upon the ground that it was not a charge which, by law, the constable could make upon the township. In consequence of this refusal, the constable duly applied to a justice of the peace, for a summons for the overseers of the poor to shew cause, why they should not pay this sum; and, upon the overseers appearing, the magistrate made an order, allowing the above sum of 18*l.*, against which order the overseers appealed. Upon hearing the appeal, the sessions confirmed the order.

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E. Alderson and *Blackburne*, in support of the order of sessions. In this case the only question is, whether this falls within 18 G. 3. c. 19. s. 4., the preamble of which recites, that whereas constables, &c., are or may be at great charge in doing the business of their parish, township, or place, and in many cases are not sufficiently indemnified by the laws, and it then gives a power to them to charge in their accounts "all sums so by them expended on account of their parish, township, or place, in all cases not hitherto provided for by the laws heretofore made, or by this act." Now these words are very large, and are to be construed liberally in favour of a public officer. By 18 and 14 Car. 2. c. 12. s. 18., the constable's rate was created for the purpose of indemnifying him against the expenses of relieving, conveying with passes, and carrying rogues, &c. to the house of correction. By the first

1821.

The King
against
Seville.

section of 18 G. 3. c. 19., his expenses before magistrates, previous to committal, are provided for. Now these are the cases within the words "provided for by the laws heretofore made, or by this act." The expenses, therefore, which he is to be allowed to charge in his accounts are different from those. They must, therefore, be of the nature of those charged in this case. Here, the constable was doing the business of the township; for to preserve the peace of the township was his especial duty, and the breach of the peace was committed in his presence, and he was bound officially to interfere. That is the distinction between this case and *Rex v. Bird*. (a) There, the breach of the peace was committed in the absence of the constable, who was afterwards called in. Here, too, no individual wrong was inflicted, as there, where there was an assault. But here, what the party was taken up and prosecuted for, was an indecent brawl in the chapel, which was a general offence to all the township.

Littledale, contra, was stopped by the Court.

ABBOTT C. J. The difficulty in this case is, to shew that it was the business of the township to prosecute the individual, who in this case committed the offence; for, unless it be clearly made out to be the business of the township, it is impossible that the sums expended by the constable, in this case, can be said to be a charge in doing the business of the parish, township, or place, so as to bring it within the act of parliament. Now I am aware of no law which says that it is the business of a parish or township to enter into such prosecutions;

(a) 2 B. & A. 522.

and I am therefore of opinion, that these expenses ought not to have been allowed by the sessions.

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BAYLEY J. The constable, in this case, acted perfectly right in taking the offender before the magistrate, but he should have done no more. He, however, together with the chapel-warden, enters into a recognizance to prosecute, having no authority to do so. Now, before he did this, he should have considered, whether he was willing to enter into such a recognizance at his own expense; and if not, he should have endeavoured to have obtained some authority from the township, in which case it would have been different; but not having done so, I think he cannot charge these sums in his account, as monies expended on account of the township. Very mischievous consequences might arise, if the act of a constable could thus subject the township to heavy law expenses.

HOLROTH J. I am of the same opinion. The constable is entitled to charge, in his accounts, the monies expended by him in his office, on account of the township. In this case, his duty was completely at an end, when he had carried the offender before a magistrate; and to prosecute, and to be bound over by recognizance to do so, was no part of his duty. In this respect, however, he chose to submit to the authority of the magistrate, and permitted himself to be bound over. But that act is not binding on the township. I am clearly of opinion, that these charges do not fall within the act of parliament, and that the sessions did wrong in allowing them.

Order of sessions quashed. (a)

(a) Best J. was absent at Chambers,

1821.

Monday,
November 4th.

The KING against The Inhabitants of ALNWICK.

An order of removal was dated 1st *August*, 1814, and an order of suspension indorsed thereon, in consequence of the sickness of the pauper; and a copy of such order and indorsement was, in 1814, served upon the appellants, but the original order not produced at the time of serving such copy; and, subsequently, in 1815, another part of the order and indorsement executed by the same Justices, but bearing date in *August*, 1814, was served upon the appellants. The pauper was not removed till 1819, when an appeal was duly entered: Held, that the services of the original order of removal in 1814 and 1815 were both defective, and that the appeal was made in time, notwithstanding
49 G. 3. c. 124.
s. 2.

TWO justices, by their order, dated the 6th *August*, 1814, removed *Margaret Walker*, a pauper, from the parish of *Alnwick*, in *Northumberland*, to the parish or parochial chapelry of *Haydon*, in the same county. On an appeal against this order at the *Michaelmas* sessions in 1820; it was discharged, subject to the opinion of this Court upon the following case: The pauper, at the time the above order, dated 6th *August*, 1814, was made, was extremely ill, and in such a state of health, that she could not be removed without danger; the execution of the order was, therefore, suspended by an indorsement thereon in the usual form. On or about the 6th *September*, 1814, a copy of the said order of removal and indorsement was delivered to and served upon one of the overseers of the poor of *Haydon*, by a person sent and authorized by one of the overseers of the poor of *Alnwick*, such person not then having the order with him; and on the 4th *October*, 1815, another part of the original order of removal and indorsement was delivered to and served upon one of the overseers of the poor of *Haydon* by the overseers of the poor of *Alnwick*. This last mentioned document, so served on the 4th *October*, 1815, had not been executed by the removing justices on the 6th *August*, 1814, but was executed by them in *September* 1815. It, however, bore date the 6th *August*, 1814. The order originally executed was not at any time shewn to any of the overseers of *Haydon*. The suspension

pension of the execution of the said order, on account of the sickness of the pauper, was taken off in *August*, 1819, and a further order was then indorsed by the justices on the order of removal for the payment, by the overseers of *Haydon*, to the overseers of *Alnwick*, of the sum of 161*l.* 17*s.* 5*d.*, being the charges proved upon oath to have been incurred by the suspension of the order of removal. On the 5th of *September*, 1820, the pauper was duly removed from *Alnwick* to *Haydon*, and an appeal against the order of removal was entered at the *Michaelmas* sessions, 1820. When the case was called on, and the facts above stated had been proved, it was contended, on the part of the respondents, that the appellants could not be heard, as they had omitted to appeal against the order of removal within the time allowed by law: the 49 G. 3. c. 124. s. 2., enacting, that when the execution of any order of removal shall be suspended, the time of appealing against such order shall be computed according to the rules which govern other like cases from the time of serving such order, and not from the time of making such removal under and by virtue of the same. The Court, however, permitted the case to proceed, and the appeal was allowed.

Marryat, in support of the order of sessions. The question in this case is, whether the appellants were too late in making their appeal. This depends on the 49 G. 3. c. 124. s. 2. which enacts, that when execution of any order of removal shall be suspended, the time for appealing against such order of removal shall be computed according to the rules which govern other like cases from the time of serving such order, and not from the time

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time of making such removal, under and by virtue of the same. The question, then, is, when was the order served? It clearly was not served in *September, 1814*, for that was an insufficient service of a copy only, without shewing the original. Nor was the second service good; for that was not a duplicate, the original having been executed in 1815; by the magistrates, without any fresh examination or enquiry. It was nothing more than a copy. Then there was no valid service till the removal took place; and in that case the appeal is in time.

Littledale, contra. It must be admitted, that the first service was insufficient; but the second was valid. The date of an order is immaterial. In *Rex v. Brimpton (a)*, it was in blank; and yet the order was held to be good. The mere circumstance, therefore, that this, which was executed in *October, 1815*, was antecedently dated, will not vitiate it. It was, therefore, an original order, which may be defined to be an order coming from the proper authority. It was not necessary that the magistrates, who were perfectly well acquainted with the case, should hear the same facts proved over again. Then, if so, the appeal should have been in 1816, and is now too late.

ABBOTT C. J. The objection made here to the judgment of the Court of Quarter Sessions, is, that they have allowed this appeal, when in point of law the appellants were not entitled to it, not having appealed within the time allowed by law. That question depends entirely

(a) 2 Nels. 184.

upon the validity of the service of the order. Now, that service, in order to be valid, must be either by delivery of the order itself, or by leaving a copy of the order, and at the same time producing the original. It is admitted; that the service in 1814 was defective; but then in 1815 there was a second service. Now, if that was the service of a copy, it was bad; for the same reason as vitiated the previous service. It is, however; contended, that this was the service of a new original order. But if we were to hold that to be so, we should; as it seems to me; give to it an effect not intended by the justices who executed it; for if they had intended it as a new order, they would have given to it a date corresponding with the time of its execution. I think that they never could have intended it as a new order, but only as an authenticated copy of their former order; and that the Court of Sessions were right in so treating it. In that view of the case, it is clear that both services are defective; and; consequently, that the appeal was in time, and the order of Sessions is therefore right.

Order of Sessions confirmed.

DAVEY and Others *against* PRENDERGRASS.

Tuesday,
November 5th.

DECLARATION in debt on a surety bond, executed by the defendants, conditioned for the payment within one month after demand of such balance, not exceeding the sum of 500*l.* as upon the settlement of accounts between the plaintiffs and *Samuel Prendergrass* and *James Peter Prendergrass*, should appear to be due from the latter to the former for coals, to be delivered

It is not any defence at law, to an action on a bond against a surety, that by a parol agreement time has been given to the principal.

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livered by them to the said *S. and J. P. Prendergrass*. Breach, non-payment of the said sum after demand. The defendants cravedoyer of the bond, and pleaded, first, non est factum, and second, a special plea in bar, that the plaintiffs had, by parol agreement, without the privity of the defendants, given time to the principal debtors to pay by instalments, and had taken a warrant of attorney to pay, by monthly instalments of 100*l.* each, a balance of 1099*l.* 9*s.*, found to be due from the latter to the former, upon an adjustment of accounts for coals sold and delivered, with a power of issuing execution, in case of default of payment of any one instalment when due. To this last plea there was a demurrer and joinder in demurrer.

W. H. Maule, for the plaintiffs. The question in this case is, whether giving time to the principal is a defence at law to an action on a bond against the surety. There are a great variety of authorities which no doubt may be cited, where, in bills of exchange, giving of time to the acceptor, will discharge the drawer: and so also in cases of bail, giving time to the principal discharges the bail; but no case can be found in which such a defence has been pleaded to a bond. In *Donnelly v. Dunn* (a) it was held, that bail cannot plead the bankruptcy and certificate of their principal, to an action of debt upon a recognizance of bail; and in *Buteel v. Jarrold* (b), which was a similar action of debt, the defence pleaded was, time given to the principal, to which there was a demurrer; and in the Court of Exchequer, judgment was given for the plaintiff, on the ground that this

(a) 2 B & P. 45.

(b) Not reported.

could

could only be taken advantage of, by an application to the equitable jurisdiction of the Court, and this judgment was successively affirmed, both in the Exchequer Chamber and in the House of Lords. In giving relief on bail-bonds, the Courts proceed on the equitable jurisdiction given them by statute 4 and 5 *Anne*, c. 15. s. 20.; but that is not done by plea, but by summary application to the Court. Suppose an action of debt on bond, brought for the benefit of an assignee, in the name of the obligee, and a plea of a release by the obligee, the Court might, perhaps, on a proper case being laid before them, order the plea to be taken off the file, but they would not allow the facts, if replied, to be a sufficient answer to the plea. The cases of bills of exchange depend entirely on the law-merchant, and are quite distinguishable. *Burke's case*, mentioned in *English v. Darley (a)*, was a case in equity. The practice of granting injunctions in courts of equity, in these cases, is also an authority to shew, that this is not a good defence at law, and no such plea as the present can be found in any of the books of entries.

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Chitty, contra. The circumstance that courts of equity have it in their power to give more extensive relief in these cases than courts of law, will satisfactorily account for the fact, that most of these decisions have been upon cases in equity; for in equity the Court can direct the securities to be delivered up. The principle, however, upon which the decisions go, applies equally to a court of law. It is to be found laid down in *Nesbett v. Smith (b)*, and it is this, that where the agreement

(a) 2 B. & P. 62.

(b) 2 Bro. Ch. Cq. 581.

with

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PRENDERGRASS.

with the principal alters the situation of the security, postponing the time of payment, the surety is released from his liability. *Samuel v. Howarth* (a), *Law v. East India Company* (b), and a variety of other authorities may be cited also to the same point. It must be admitted, that the cases in courts of common law, on questions arising, for the most part, on bail-bonds, as *Rex v. Sheriff of Surrey* (c), *Thomas v. Young* (d), *Bowfield v. Tower* (e), *Croft v. Johnson*. (f) In *Moore v. Bowmaker* (g), Gibbs C. J. says, "The principle was first adopted in the Court of Chancery, that if a creditor gives time for payment to his principal debtor without giving notice to the surety, the latter remains no longer liable to the debt." And he then adds, "The courts of law, in late days, have acted on the same principle in cases of bail." So that it should seem that learned Judge treats it as a principle which could be extended properly to courts of law. Now that principle ought to be extended to this case; for otherwise the obligor and obligee might combine together to defraud the surety. In *Orme v. Young* (h), this very point came before Gibbs C. J., but was not decided. He also cited *Beadle's case* (i), and *Grenningham v. Ewer*. (k)

ABBOTT C. J. Looking at the nature of the security in this case, it is impossible to say, that the sureties sustained any prejudice by what has taken place, for, if the first 100*l.* was not paid, immediate execution might

(a) 3 *Meris.* 272.(c) 1 *Taunt.* 159.(e) 4 *Taunt.* 456.(g) 6 *Taunt.* 382.(i) 3 *Leon*, 159.(b) 4 *Ves.* 824.(d) 15 *East*, 617.(f) 5 *Taunt.* 519.(h) *Holt, N. P. C.* 84.(k) *Cro. Elix.* 396.

have

have issued, and it could not have been set aside. The ground, however, of my opinion in this case is, that general rule of the common law which requires that the obligation created by an instrument under seal, shall be discharged by force of an instrument of equal validity. The operation of that rule is, indeed, sometimes such, as to make it imperative upon a court of equity to interpose and grant relief, but it by no means follows, that the rule of law is to be broken down, because a Court having jurisdiction of another kind, will interpose where there is a particular case, in which the rule of law may be found to operate harshly. There is great objection to a court of law taking upon itself to act as a court of equity, because they have not the means of doing that full and ample justice which the particular case may require. We ought not, therefore, to interpose in a matter which seems peculiarly to belong to the jurisdiction of a court of equity. If a parol agreement is entered into to give time to the parties, supposing it not the case of a surety, but simply the case of a common bond conditioned for payment of money at a certain day, it will not prevent the party from proceeding at law immediately, whatever the consideration for the delay may be. And if that be so, how can the giving of time to a third person by such an agreement, prevent the obligee of the bond from proceeding at law against the surety. There may indeed be such a consideration for the agreement, as may induce a court of equity to direct that the party shall not proceed to enforce his remedy at law. But a parol agreement of this nature can never operate to controul the obligation of this bond in a court of law. The decisions which have taken place in the courts of equity in cases of this nature,

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nature, have always, as I understand them, proceeded on the notion, that at law, the thing prayed for could not be done. Bills of exchange stand upon a very different footing, there the law merchant operates, and the courts of law decide upon them with reference to that law. Guaranties for the payment of debts are not in general instruments under seal, and there is no strict technical rule, which, as to them, prevents a court of law from looking to the real justice of the case. The cases of bail and replevin bonds are provided for, by acts of parliament giving to the court an authority over them. But in both these cases, the jurisdiction is exercised always upon special application founded upon affidavits and not upon plea. A recognizance of bail stands upon a different ground from bail bonds as to the jurisdiction of the court. There the jurisdiction is not founded upon statute, but upon a general authority in the Court, to see that an improper use is not made of its own records. Therefore, in that case, as well as in the case of bail to the action, and of bail to the sheriff, if the Court sees that an improper use is attempted to be made of the security which the party has given, it immediately interferes. And that also is always done upon special application to the Court, upon affidavits setting forth all the circumstances of the case. In the case of *Bulleet v. Jarrold* in the House of Lords, which has been referred to, in which an attempt was made to put the matter on the record by way of plea, it was held, that it was no bar to the action. So in this case, which appears to be the first of the kind brought before this Court, although similar cases must have occurred very frequently, I am of opinion that we, deciding on legal principles, are bound to say, that this plea is no answer

to

the plaintiff's action. There must, therefore, be judgment for the plaintiff.

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DAVEY
against
PAYNEGRASS.

HOLBOYD J. (a) I think that, in this case, the plea is not good in law. The circumstances there stated neither amount to a performance of the condition, nor to a legal excuse for non-performance of it. The bond which has been executed by these two sureties is conditioned for the payment of any balance not exceeding 500*l.* that may be due for goods sold upon credit to two other persons, within one calendar month after demand made. The effect of the plea is, that an unreasonable time was given to the original debtors, and that a warrant of attorney was taken for that purpose, having been given in pursuance of a parol agreement. Such an agreement, and the taking of the warrant of attorney, in my opinion, does not constitute, in law, a payment of the original debt, nor an annihilation of it. The mere giving time by parol, without consideration, is not even binding on the party himself. In this case, there seems to have been some consideration for the time given, namely, the giving the warrant of attorney, which would give the plaintiff a debt of a higher nature, by allowing a judgment to be entered up in case of non-payment of the first instalment. That certainly was a good consideration for the forbearance. But the merely giving an engagement that a man shall not sue for a limited time, is not a release in law of the original debt. An agreement that a man shall not sue at all, with a good consideration for it, amounts to a release, and would be an annihilation of the original

(a) *Bayley J.* was absent at Chambers.

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vs
PARKER & CO.

debt; but an agreement to give a limited time to the debt, as in this case, does not destroy the original debt, nor the liability to the payment of it. The original debt, then, remains; and by the condition of this bond the obligors are bound to pay within a month after mand made of them. There is no performance of condition of the bond, nor any release of the original debt. None of the circumstances mentioned in the plea amount to a performance of the condition; if they could, the condition would then be considered as performed, and the defence would be good in law. It is that is not so; the whole defence set up arises upon a parole agreement. Now, suppose to that parole agreement the obligors had been parties, and the obligor had stipulated that they would not sue on the bond still, unless that agreement was of as binding effect as the bond itself, it would avail nothing; for a mere parole agreement cannot be pleaded in bar, unless by operation of law it amounts to the performance of that which is the subject-matter stipulated for by the condition. Neither of these cases exist, from the circumstances which have been pleaded in this case; and, therefore, I think this plea does not amount to a defence in law. All the cases, or nearly so, upon this subject, except cases on bail-bonds, in which this Court entertains a sort of equitable jurisdiction, have been cases decided in courts of equity; and I think that the very principle upon which courts of equity give relief is, that the circumstances under which they give relief do not afford a good defence in point of law. I think this plea is bad.

BART J. I am also of opinion that this plea is bad. The case which has been referred to, as having been decided in the Court of Exchequer, and finally in the House of Lords, appears to me, in principle, to be decisive of the present case. That being the case of a recognizance of bail, the Court had a right to interfere, with respect to the use made of that recognizance, being one of their own records, in a manner in which they would not interfere in an action upon a bond; but that circumstance made no difference in the decision. It was there decided, that the giving time to the principal, although the party might be relieved by the equitable jurisdiction of the court in which the recognizance of bail was taken, could not be pleaded in answer to the action. It is also perfectly clear, that no delay on the part of the creditor, in calling upon the principal debtor to pay, will, in a court of law, discharge the security. In the case of the *Trent Navigation Company v. Harley* (a), it is there said by Lord Ellenborough, that no such delay would be a discharge of the security, in point of law, from an obligation of this description. The indulgence, by giving farther time, is, in this case, by paid; if this would be an answer to an action on a bond in a court of law, there is no doubt we should have found numerous precedents on the records of this court, in which it had been so decided; because cases of this kind must have frequently occurred; but every instance in which relief is given by a court of equity, is a decision against this as a defence at law. I am of opinion, that if these defendants are entitled to any redress, they must go to a court of equity, where the Court may

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DEBT
against
RECOGNIZANCE.

(a) 10 East. 34.

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DAVEY
against
PRENDERGRASS.

consider every circumstance, and judge for itself whether any relief can be afforded. We, however, have only power to decide upon the legal validity of the instrument. I think, therefore, there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

W. J. RICHARDSON the Younger and Others,
Assignees of the Estate and Effects of HENRY
WYLIE and W. J. RICHARDSON the Elder,
against CAMPBELL and Another.

A transfer of a ship, while at sea, to a vendee resident in the port in which the ship is registered, is not valid, unless copies of the bills of sale are delivered to the custom-house officers in that port, within a reasonable time after the sale.

TROVER for a ship. Plea, the general issue. The cause was tried at the *London* sittings before *Michaelmas* term, 1820, when the jury found a verdict for the plaintiff for 1989*l.* damages, subject to the opinion of the Court on the following case:

A commission of bankrupt was issued, on the 23d *December*, 1817, against *H. Wylie* and *W. J. Richardson*, of *London*, merchants and partners, founded on a sufficient trading and petitioning creditor's debt, and an act of bankruptcy was committed by both the bankrupts on the 22d *December*, 1817, and the plaintiffs were appointed assignees under the commission. On the 30th *December*, 1816, the said *H. Wylie* and *W. J. Richardson* the elder, together with the other plaintiff, *W. J. Richardson* the younger, were the owners of the ship *Sir Alexander Ball*, belonging to the port of *London*. *W. J. Richardson* the elder, on the 7th *September*, 1815, (he being then a part-owner of the ship *Sir Alexander*

and *Ball*) duly executed a power of attorney to his partner, *H. Wylie*, to sell his share in the ship, &c. and execute a bill of sale in his behalf. A bill of sale of the ship to the defendants was duly executed by the respective parties on the 31st *December*, 1816; and another bill of sale was executed on the 21st *July*, 1817, by the said *W. J. Richardson* the younger, of part of the said ship. At the time of the execution of the bills of sale, the several parties thereto were resident in the city, of *London*, except *W. J. Richardson* the elder, who was at sea. On the 31st *December*, 1816, when the first of the above-mentioned bills of sale was executed, the said *H. Wylie* handed over to the defendants the original bill of sale, which had been made to the said *W. J. Richardson* the younger, of one 64th part of the said ship, dated 28th *March*, 1816. At the respective times of the execution of the bills of sale, there was a much larger sum of money due from *Wylie* and *Richardson* to the defendants than the amount of the consideration expressed in the bills of sale. On the 31st *December*, 1816, the ship was at sea on a voyage from *London* to *Haiti*, and from thence to *Rotterdam*, under the directions of *W. J. Richardson* the elder, who was in her, and who was ignorant of the said transfers till the ship was taken possession of by the agents of the defendants. The ship, from the time she left *England* on her voyage, in *April*, 1816, has not since returned to the port of *London*, or any other port in *Great Britain*. No copy of either of the bills of sale was at any time delivered to the person or persons authorized to make registry and grant certificates of registry in the port of *London*, nor was any entry thereof indorsed, on the oath or affidavit, upon which the original certificate of registry of such

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ship or vessel was obtained, nor was any memorandum thereof made in the book of registers, nor was any notice thereof given to the commissioners of the customs in the port of London. In January, 1817, the ship arrived at Leghorn, under the command of the said *W. J. Richardson* the elder, and was shortly afterwards taken possession of by Messrs. *Fletcher, M. Bean, and Co.*, as the agents of the defendants, by virtue of the transfers which had been made to the defendants, as before mentioned; and on the 11th December, 1817, the ship was sold and assigned by *Fletcher, M. Bean, and Co.*, under a power of attorney from the defendants, and the certificate of registry of the ship, which had been deposited by the said *W. J. Richardson* the elder in the hands of his *Britannic Majesty's* consul, thereupon remained with the consul, for the purpose of being cancelled. This case was argued on a former day in these sittings, by *Campbell* for the plaintiffs, and *Puller* for the defendants; and the question turned entirely on the construction of the 31 G. 3, c. 68, s. 16. (a) It is unnecessary to report the arguments,

(a) The words of that section are: "Provided always, that if any ship or vessel shall be at sea, or absent from the port to which she belongs, at the time when such alteration in the property thereof shall be made as aforesaid, so that an indorsement ^{on} certificate cannot be immediately made, the sale, or contract, or agreement for the sale thereof, shall, notwithstanding, be made by a bill of sale or other instrument, in writing, as before directed; and a copy of such bill of sale or other instrument, in writing, shall be delivered, and an entry thereof shall be indorsed on the oath or affidavit, and a memorandum thereof shall be made in the Book of Registers, and notice of the same shall be given to the commissioners of the customs, in the manner hereinbefore directed; and within ten days after such ship or vessel shall return to the port to which she belongs, an indorsement shall be made and signed by the owner or owners, or some person legally authorized for that purpose by him, her, or them, and a copy thereof shall be delivered, in manner hereinbefore mentioned; other-

wise

ments, inasmuch as they are adverted to in the judgment delivered by the Court, and did not materially differ from those which were urged, upon the same point, in the case of *Hubbard v. Johnstone*. (a) The authorities cited on the part of the plaintiffs were, *Moss v. Charnock* (b), *Palmer v. Moxon* (c), *Dixon v. Ewart* (d). On the part of the defendants, *Hubbard v. Johnstone*, and *Hodgson v. Browne* (e), were cited.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. We are of opinion that this action may be maintained. The question is, whether at the time when the defendants took possession of and sold the ship, the title thereto was vested in them under the bills of sale executed by the plaintiff, *W. J. Richardson* the younger, and the bankrupts, or whether those bills of sale became invalid, and thereby the property at the time I have mentioned was vested in the plaintiffs. There is no objection to the sufficiency of the bills of sale in themselves: the objection to the defendants' title is, that by their omission to deliver copies of the bills of sale to the custom-house in *London*, within a reasonable time, the bills of sale became null and void. It is clear, that

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vide such bill of sale, or contract, or agreement for sale thereof, shall be utterly null and void, to all intents and purposes whatsoever; and entry thereof shall be indorsed, and a memorandum thereof made, in the manner hitherto directed."

(a) 3 *Traut.* 177.

(b) 2 *Exp.* 399.

(c) 2 *M. & S.* 43.

(d) 3 *Martineau*, 322.

(e) 2 *Barn. & Ald.* 127.

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a reasonable time for delivering those copies had long expired, and no copies ever were delivered, so that the question is, in effect, reduced to the necessity of delivering copies. We who heard the argument, are all of opinion (a), that it was necessary to deliver them, and that by the omission to do so, the bills of sale became invalid by the effect of the 34 G. 3. c. 68. s. 16. In support of the defendant's title, and against the necessity of delivering copies, the decision of the Court of Exchequer Chamber in the case of *Hubbard v. Johnstone*, was cited and relied upon. But there is a material difference between the two cases. In that case, the ship belonged to, and was registered in the port of *Newcastle*. While she was at sea on a voyage, a bill of sale was executed, conveying the property to *Hubbard*, who resided in *London*. The ship never went to the port of *Newcastle*, but came to *London*, and was there registered anew by *Hubbard* the vendee, at the custom-house in *London*. In the present case, the ship belonged to *London*; the bills of sale were executed in *London*, and the defendants were resident in *London*, so that the change of owners would not occasion a change of port. In the former case, according to Mr. *Taunton's* report, the opinion of one at least of the learned judges who were for reversing the judgment of this Court, was grounded entirely upon the change of the ship's port; he being of opinion, that the 16th section of the statute is confined to the case of a sale when the ship is at sea, and does not change her port. This change of port appears also to have weighed materially with the other judges, though it appears that some of them, and par-

(a) *Abbott C. J., Bayley J., and Holroyd J.*

ticularly

icularly Mr. *Baron Wood*, thought the annulling clause at the end of the 16th section, must be confined in construction to the omission of an indorsement, and delivery of a copy thereof, within ten days after the ship's return to her port, and could not be extended to any of the precedent parts of the section, because it could not be extended to all the precedent parts, as it undoubtedly cannot. In the present case, as I have before observed, the change of ownership would not lead to a change of port, and the present case is not one of those in which the legislature has required a register *de novo*. And supposing the words "alteration of property in the port to which the ship belongs," as they are found in the 15th section, by which an indorsement on the certificate and delivery of a copy thereof are required, to be confined to a change of owners only, without a consequential change of port; we think it clear, that if the ship be absent from her port at the time of such change, "so that an indorsement on the certificate cannot be immediately made," which are the words of the 16th section, the delivery of a copy of the bill of sale is, by that section, substituted in the place of the indorsement on the certificate, until ten days after the ship's return, and the omission to deliver a copy of the bill of sale is to be followed by the same consequence in the case of an absent ship, as the omission to make the indorsement and deliver a copy thereof, if the ship be at home. In the 15th section, the clause of nullity follows immediately after the requisition of the indorsement and delivery of the copy thereof, and is itself followed by the direction to the officers, to which therefore it does not apply in form, as in reason it ought not to apply. The 16th section begins with the word "provided always," and

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and evidently contains a substitution of a new matter in the place of the matter previously required by the 15th, where the matter so previously required is impracticable; and therefore, even if the 16th section had contained no express clause of nullity, still there would be strong reason to say, that the clause of nullity in the 15th section should be drawn down and applied to so much of the 16th, as contained the substituted matter. But taking the two clauses together, and seeing that, by the very form and frame of the 15th section, the clause of nullity applies only to the acts of the parties, we find no difficulty in saying, that it may be so confined in the 16th section, although it follows all that is therein mentioned, as well the acts of the parties as those of the officers; and that it may, and ought to be extended to all the acts of the parties, as well that act which is mentioned before the direction to the officers occurs, as that which is mentioned after such direction. If this be not the true construction of the 16th section, in a case to which that section will apply, if it be not necessary to deliver a copy of a bill of sale, in the case of a sale made in the ship's absence, to a person residing at her port, then it may follow, that the ship may, for as many years as she shall continue serviceable, enjoy the privileges of a *British* ship, and trade as such, not only from one plantation or part of the king's foreign dominions to another, but also from, and to any port of *Great Britain*, except her own port, and during the whole of this period, the names of her real owners will be unknown to, and undiscoverable by, the officers of the government. And this, as far as it extends, will be in utter contravention of the policy of these statutes, and defeat their object, which object unquestionably was to furnish,

furnish, by the medium of registration, an accurate knowledge, at every instant of time as far as practicable, of the name of every person having property in a *British* ship, in order to secure the benefits of that national character of a ship to his majesty's subjects, and to exclude foreigners from participating in them.

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Judgment for plaintiffs. (a)

(a) It appeared in this case that the ship, on her arrival at *Leghorn*, was attached, to answer a claim made on behalf of certain merchants in *London*, for compensation on account of her not having carried a quantity of tobacco (which had been shipped at *Hayti*) to *Rotterdam*, agreeably to bills of lading; and the defendants' agents were obliged to give security to answer this claim, and, afterwards, under the sentence of the Court, to pay the amount thereof. The defendants' agents had, besides, paid, in pursuance of an order of a competent court at *Leghorn*, a certain sum for salvage of the ship, she having been driven on shore in a gale of wind before she was taken possession of by them. They had also paid, in pursuance of an order of the court, a certain sum for the wages of the captain and the crew. And they had also paid other sums for hutchmen' and ship-chandlers' accounts, and sundry ship disbursements, before she was taken possession of by them. And it appeared, further, that the defendants knew of the fact of the voyage to *Rotterdam* having been abandoned; for they had cancelled a policy originally effected from *Hayti* to *Rotterdam*, and effected another from *Hayti* to *Malta*. The Court were clearly of opinion, that the money paid under the attachment, the salvage, and the mariners' wages, were a lien on the ship, and that the defendants, therefore, were entitled to deduct those sums from the proceeds of the sale of the ship, but not the sums paid for the captain's wages, nor the disbursements; and the verdict was reduced accordingly.

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of the Goods left unadministered by JAMES
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Assumpsit will lie upon a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognised by statute.

A power of attorney authorising an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all monies, debts, dues, whatsoever, and to give sufficient discharges, does not authorize him to indorse bills for his principal.

ACTION against the defendants, as acceptors of four bills of exchange. The first was for 8940*l.*, and dated *Fort St. George*, the 20th *January*, 1809, drawn by *Keble*, the secretary to Government; payable to *William Hope*, Esq., three months after sight. This bill was directed to the Honourable Court of Directors for affairs of the Honourable United Company of Merchants trading to the *East Indies*, in *London*; and it appeared to have been accepted by the secretary, by order of the Court, from the 20th *July*, 1809; and it was indorsed by *James Card* to *Davies* and *Card*, or their order, and by the latter again to *Barclay*, *Tritton*, and Co. The second and third bills of exchange, which were for 13,200*l.* and 1141*l.*, respectively, were of the same date, payable at three months' sight, and precisely

In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing.

An agent, having money in his hands belonging to his principal, purchases with it a bill of exchange, which he indorses specially to his principal; the latter, at the time of the indorsement, was dead, but that fact was not known to the agent: Held, that the property in the bill passed to the administrator of the principal, and that he might, therefore, sue upon the bill in that character: Held, also, that the administrator was only entitled to recover interest upon bills accepted after the death of the testator, from the time of demand of payment made by the administrator, and not from the time the bills became due.

Where the declaration stated the drawing of certain bills of exchange, and their acceptance after the death of the intestate, the granting of the letters of administration to the plaintiff, the defendants' liability, &c.; and the defendants pleaded that the cause of action did not accrue within six years, to which the plaintiff replied generally, that it did accrue within six years: It was held, that the replication was good.

in the same form as the first. The fourth bill, which was for 705*l.*, was dated the 26th *August*, 1809, and was accepted from the 12th *April*, 1810, and payable at twelve months' sight to Messrs. *Binny and Dennison*, and indorsed by them to *William Hope*, Esq., or order.

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The declaration contained counts on the first three bills, stating, respectively, the drawing of the bills; the acceptance of them, after the death of *William Hope*; the grant of administration to *James Murray*, on the 13th *February*, 1812; the liability of the defendants to pay to *James Murray*, as administrator, according to the form and effect of the bills; and their acceptance, and a promise to *James Murray*, as administrator, accordingly. Another set of counts on these three bills stated, the drawing of the bills; the acceptance of them; that neither the said *W. Hope*, nor *James Murray*, nor the plaintiff, nor any persons as the personal representatives of *W. Hope*, made any order for payment of the bills; nor had the money been paid to them, or either of them: the grant of administration to *James Murray*, on the 13th *February*, 1812; the grant of administration of the 31st *October*, 1814, to the plaintiff; the liability of the defendants to pay the plaintiff, as administrator, on request, and a promise accordingly. The declaration also contained a count on the fourth bill, stating the drawing of the bill; the indorsement by *Binny and Dennison*; the payees ordering the money to be paid to the said *W. Hope*; the acceptance; the grant of administration to *James Murray*; the liability of the defendants to pay to *James Murray*, as administrator, according to the tenor and effect of the bill; and acceptance, and a promise to *James Murray*, as administrator, accordingly. Another count on the same bill, after
stating

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stating the drawing of the bill, alleged that *Binny* and *Dennison*, after the death of the said *W. Hope*, having been indebted to him at the time of his death in the sum mentioned in the bill, and the debt remaining due and unpaid, in satisfaction of the said debt indorsed the bill at *Madras*, ordering the money to be paid to the said *W. Hope*, and remitted the bill to *England* in a letter, addressed to *Hope*; that after his death, the defendants accepted the bill; that after the bill was due, administration was granted to *James Murray*, whereby the said defendants became liable to pay to him, as administrator, on request, and promised payment accordingly. The declaration contained the common counts; and a profert of the letters of administration was subjoined. Plea, *non assumpsit*; secondly, as to the counts on the first three bills, that the causes of action did not accrue within six years before the commencement of the action. Replication, that the causes of action did accrue within six years, &c. The cause was tried before *Abbott C. J.*, at the sittings after *Trinity* term, 1819, when the jury found a verdict for the plaintiff for the principal sum due upon the bills, with interest from the time they respectively became due till the time of signing final judgment. Upon a motion for a new trial, the Court directed the facts to be stated in a special case.

The four bills of exchange declared upon were drawn by order of the governor in council, at *Madras*, in the usual form in which bills of exchange are drawn upon the *East India* Company at home from the different presidencies in the *East Indies*. They were severally accepted in the usual manner by the secretary to the Company, by order of the Court of Directors. Bills so drawn on the Company are always accepted in this form by the secretary for

for the time being, by order of the Court of Directors, and being so accepted, are paid by the Company. The defendants have paid bills, so drawn and accepted, to the amount of many millions. Mr. *Hope*, the payee of the three first bills, being about to embark for *London*, remitted them in a letter by one of the ships in the fleet hereinafter mentioned. This letter was inclosed in a sealed envelope, addressed thus: "*Wm. Hope, Esq., to the care of John Card, Esq., London.*" It was not addressed to any person by name, and was as follows: "My old friend, you will find inclosed bills as follows, which, when cashed, I would recommend your being particularly careful of." The letter then specified the several bills inclosed, including the first three bills mentioned in the declaration in this cause. On the 30th January, 1809, *Hope* embarked, with his wife and family, on board the ship *Jane Duchess of Gordon*, and sailed with a large fleet of *East Indiamen* for *Europe*. On the 14th of March the fleet encountered a hurricane, and the *Jane Duchess of Gordon* perished in the storm, and *Hope* was drowned. On the 7th of October, 1800, *Hope* executed a power of attorney to *Card*, by which he appointed *J. Card* to be his true, certain, and lawful attorney for and in his name, and to and for his proper use and behalf, to demand, levy, sue for, recover, and receive, by all lawful ways and means whatsoever, and from all and every person and persons whomsoever, whom it did or might concern, all such sums of money, debts, dues, goods, effects, and things whatsoever, which then were and should be and prove due, owing, payable, or belonging to him the said *W. Hope*, upon or by virtue of any bill, bond, book, or upon account of trading or dealing, or upon any account howsoever;

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and, if need were, to call to account all persons concerned in the premises; and upon receipt and recovery of all such sums of money, debts, dues, goods, effects, or other things, or any part thereof, sufficient acquittances and discharges for him and in his name, from time to time, to make and give; giving and granting by them, unto his attorney full power and authority in the premises to sue, pursue, arrest, attach, seize, sequester, implead, imprison, condemn, and prosecute, and them and there- of again to acquit, discharge, and out of prison to release, also for him to appear, and his person to represent in all or any court or courts, or other places, as demandant or defendant in any suit or action, or by reason of the premises; likewise one or more attornies under him, to set and substitute and appoint, and again at pleasure to revoke; and generally to do, act, and perform all other matters and things in and towards the premises requisite and necessary, as fully as himself could do, if he were personally present. *John Card*, who was at *Madras* at the time when the power of attorney was executed, and who had been at one period in partnership with *Hope*, in *India*, soon after sailed to *England*, and since his arrival has continued to reside here, and has been in partnership with *William Davies*, under the firm of *Davies and Card*. The first three bills of exchange were not indorsed by *Hope*, but having come into the possession of *Card* after *Hope's* death, were indorsed by him in the following form. "Pay Messrs. *Davies and Card*, or their order, per procuration of *William Hope*. — *J. Card*." These bills, when due, were paid by the defendants to *Barclay, Tritton, and Co.*, then the holders thereof. Before *Hope* left *Madras*, he appointed Messrs. *Bisny* and

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and *Daniell*, of *Madras*, his agents, to manage his private affairs, collect his property there, and transmit the same to *London*; and he left in their hands a government promissory note for 1660 pagodas, which was paid by them at the treasury, and they received for it the fourth bill of exchange mentioned in the declaration. *Binny* and *Daniell* indorsed the bill specially to *Hope*, and remitted it in a letter addressed to him at Messrs. *Davies* and *Card*'s. The letter came to *Davies* and *Card*, in *April*, 1810, was opened, and the bill taken out, and the name "*W. Hope*" was indorsed on the bill. This bill was paid when due to *Glyn, Mills* and *Co.*, then the holders thereof. On the 13th *February*, 1812, letters of administration of the effects of *Hope*, with his will annexed, were granted to *James Murray*. There were no executors named in the will of *Hope*. *James Murray* died on the 10th *October*, 1814, and on the 31st of *October*, 1814, letters of administration of the effects of *Hope*, unadministered by *James Murray*, with his will annexed, were granted to the plaintiff. The action was commenced on the 27th of *August*, 1816.

This case, which involved several points, was argued on a former day in these sittings, by *Campbell*, for the plaintiff, and *Tindal*, for the defendant. For the plaintiff it was contended, that assumpsit was maintainable in this case against a corporation; for a corporation established for trading purposes, might bind themselves, by accepting bills of exchange. *Broughton v. The Manchester Water-Works.* (a) And this power of the defendants to draw and accept bills was recognized and regulated by the 9 and 10 *W. 3. c. 44.*, and the 53 *Geo. 3.*

(a) 3 *Barn. & Ald.* p. 1.

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c. 155., s. 57 and 58. In *Edie v. The East India Company* (b), it was not doubted that an action would lie against the Company upon a bill of exchange. As debt will not lie against the acceptor of a bill of exchange, as sumpsit must in this case, otherwise there will be no remedy. For the defendants, upon this point, it was argued that although they had undoubtedly the power of binding themselves as acceptors of bills of exchange, it by no means followed, that the remedy which the law gave for the breach of a parol promise, would apply against a corporation. The objection to this form of action was, that a parol promise can be made only by the members of the corporation, and that the individuals, and not the body corporate, would be liable. The proper remedy in this case was by bill in equity. Upon this point, the Court were clearly of opinion, that wherever an act of parliament authorizes a corporation to draw and accept bills, it must be taken to give the holder of those bills the same remedy against the body corporate, as the law gives in other cases against any parties to a bill.

The next point was, whether *Card* was authorized to indorse these bills; and it was contended, for the plaintiffs, that he had no authority to indorse the bills, even during the life of *Hope*. The power of attorney only gave an authority to him to receive debts due, and not to negotiate the bills. *Hogg v. Snaith* (b) and *Hay v. Goldsmidt*, there mentioned, were authorities to shew, that a power of attorney to receive all salary and money belonging to the principal, and to give releases, and even to transact all business for him, did not authorize the attorney to negotiate or indorse bills. The letter contained no such power, for *Card* had not even an au-

(a) 2 Burr, 1216.

(b) 1 Trunt, 347.

thority

authority to break the envelope. For the defendants, it was argued, that *Card* had such authority; for the indorsing of the bills was one mode of receiving payment, and in the case cited, the action was brought against the persons who had discounted the bills, and not against the acceptor; and it was the same thing, whether *Card* received the amount of the bills at maturity, or authorized another to receive it. Besides, it appeared clearly, from the terms of the letter, that *Card* was to open it, if *Hope* died on the voyage. The words in the letter "when cashed," implied, that he was to have authority to indorse the bills; for one mode of cashing is by indorsement. Upon this point, the Court were clearly of opinion, that *Card* had no authority to indorse the bills, even during the lifetime of *Hope*; and that it therefore became unnecessary to consider the question, whether *Hope's* death operated as a revocation of any authority given to him by the power of attorney.

Upon the other points raised in this case, the Court gave no opinion at the time. It was contended on the part of the defendants, that the plaintiff could not be entitled to recover interest upon the bills beyond the date of the first letters of administration, for it would be very hard upon an acceptor, that he should be charged with interest when he was ready to pay the money, and there was no person authorized to receive it. There could be no wrongful detainer of the money until the administration was granted, *Walker v. Barnes* (a) and *Anonymous* (b) were cited. As to the two other points raised in the case with respect to the statute of limitations and the form of the replication, the follow-

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(a) 5 Trunt. 240.

(b) 6 Mod. 138.

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ing authorities were cited, *Stanford's case in Saffyn* v. *Adams* (a), *Joliffe v. Pitt* (b), *Cary and Wife v. Stephenson* (c), and *Matthews v. Phillips*. (d) The argument and the authorities cited upon these points, were, however, so fully commented on by the Court in giving their judgment, that it is unnecessary to state them at greater length here.

C. A. V.

ABBOTT C. J., now delivered the judgment of the Court. At the late argument of this case, some of the points were disposed of by the Court at the time. It is now proposed to give our judgment upon such as were then reserved for our further consideration. And first, as to the statute of limitations. The action is brought by an administrator, with a will annexed, of goods left unadministered by a former administrator, but it may be considered as brought by the first administrator. The action is upon several bills of exchange accepted by the defendants, who have pleaded as to three of them, that the cause of action did not accrue within six years before the exhibiting of the plaintiff's bill. The plaintiff has replied generally, that the cause of action did accrue within six years, &c. These bills were made payable to Mr. Hope: they were accepted after his death, being presented through an unauthorized channel, and before any administration was granted. The acceptance of the bills, and also the day of pay-

(a) *Cro. Jac.* 61.(b) 2 *Vernon*, 694.(c) *Salk.* 421. *Carthw.* 338. *Skinner*, 555. and 4 *Mod.* 372. S. C.(d) *Salk.* 424.

ment,

ment, was more than six years before the exhibiting of the bill, but the granting of the first administration was less than six years before, &c. Upon this state of facts, the general question of law, abstracted from the particular form of the replication, is this; did the time of limitation prescribed by the statute 21 *Jas.* 1. *c.* 16. *s.* 3., begin to run from the date of the defendants' acceptance, or the day of payment, at which time there was no person in existence who could acquire a right of action by the acceptance, and non-payment, or from the date of the first administration, whereby a person was brought into existence, who might acquire a right of action by the non-payment? The plaintiff insisted upon the latter, the defendants upon the former date.

On behalf of the plaintiff, *Stanford's* case, cited in *Cro. Jac.* 61., and *Cary v. Stephenson*, reported in *Salkeld*, 421., and several other books, were quoted. The first of these cases arose upon the statute of fines, 4 *Hen.* 7. *c.* 24.; a term of years was granted in remainder, expectant on another existing term; before the expiration of the first term, the grantee died: at the expiration of the first term, the lessor entered, and levied a fine before administration granted; the five years passed, administration was granted, and resolved, that the administrator should have five years, for none had title of entry before. The last of these cases is precisely the same as the present case. It was an action of assumpsit for money had and received, brought against one who had received money belonging to the estate of the intestate, after his death, and before administration granted; the receipt being more than six years before the action, but the grant of the administration within six years. The opinion of the Court was, that the time of limitation did not begin to

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run until the grant of the administration; but the suit appears to have gone off, or the plaintiff to have failed upon a supposed defect in his replication. Since the argument, we have been apprized of another case lately decided in the Court of Common Pleas, but not reported. The name of it is *Fairclough v. Little*. It arose upon the gift of a term of years to *A.* for life, remainder to *B.* for life, remainder to *C.* *C.* died in 1736, *A.* in 1757, *B.* in 1779. Administration of the effects of *C.* was first granted in 1816, and the administrator brought an ejectment, and was nonsuited at the trial, but the Court granted a new trial. No authority was quoted on this part of the case, on behalf of the defendant. But it was said, that *Stanford's* case was not an authority in point, because it arose on a statute differently expressed; the words of the statute *Hen. 7.* being "so that they take their action or pursue their right within five years next after such action, right, &c. to them accrued, descended, &c." In answer to the other case quoted for the plaintiff, it was said, that as the cause was not decided in favour of the plaintiff, the opinion must be considered as extrajudicial, and that the whole of that case taken together, was in favour of the defendant upon the other point, to which I shall advert hereafter. We are, however, of opinion, that the time of limitation in the present case did not begin to run until the grant of the administration. The words of the statute 21 *Jas. 1. c. 16. s. 5.* are, that actions upon the case, &c. shall be brought within six years, next after the cause of such actions, and not after. Now, independently of authority, we think that it cannot be said, that a cause of action exists, unless there be also a person in existence capable of

of

of suing. And we think great deference is due to the opinion delivered by the Judges on this point in *Cary v. Stephenson*, and also, that *Stanford's* case, and the late case in the Common Pleas, are authorities in favour of the plaintiff. The several statutes of limitation being all in pari materia, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same. I have already quoted the words of the statute of fines. The words of the first section of 21 Jac. 1. c. 16., as it regards entry into lands, are, "that no person or persons shall make entry into any lands, &c. but within 20 years next after his or their right or title, which shall hereafter first descend or accrue to the same." Other slight variations of expression may be found in other parts of this, and the statute 32 Hen. 8. c. 2. But it is not necessary to particularise them; the object manifestly being to limit the time of entry or suit to a person in esse, capable of entering or suing, and nothing more.

On this part of the case, another and formal objection was taken by the defendants. It was said, that the plaintiff ought to have made a special replication, setting forth the time of the grant of administration and other particulars. Now, it already appears upon the record, that the acceptance was after the death of the intestate. What special matter then could the plaintiff reply? It could only be, that the first administration was granted at such a certain time, which probably does not appear with sufficient precision upon the declaration. But this would only have been an argumentative replication, for its effect would be this: you, the defendants, have alleged that the cause of action did not accrue within six years: I, the plaintiff, say, that it did accrue within six

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years, because my bill has been filed within six years of the grant of administration. Now, if this be the due effect of the grant of the administration, then the plaintiff did right in omitting the argument, and replying generally, that the cause of action did accrue within six years, and offering the administration, and the time of granting it, in evidence, to prove his allegation. And this is very different from all the cases in which a special replication is usually made, such as infancy, coverture, absence beyond sea, or the suing out a latitat, or other writ, or process, because, in all those cases, the plaintiff admits, that the action did not really accrue within six years of the apparent commencement, and either brings himself within some exception in the statute, or shews that his action was commenced before the date, which the plea assigns as the commencement of it.

There was a fourth bill of exchange, to which the statute was not pleaded, and which gave occasion to another point. Mr. *Hope*, at his departure from *India*, had left some property under the management of an agent. For the value of this, and for the purpose of transmitting the value to *England*, the agent obtained this bill of exchange, and being ignorant of the death of *Hope*, indorsed it specially to him. It was urged, that no property in this bill could pass to the administrator, and consequently, that he could not sue upon it. But we are of opinion, that as the money for which the bill was remitted, belonged to *Hope's* estate, it was competent to the administrator to elect to take the bill as the mode of payment, and that thereby, the property did vest in him, and he acquired a right to sue upon it.

The

The only remaining matter is the interest upon the bill, which has been taken from the time that they respectively fell due. We are of opinion, that the plaintiff is entitled to recover interest, but that the calculation must begin from the time of the demand of payment by the first administrator, and not sooner.

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Judgment for the plaintiff.

REGULA GENERALIS.

Wednesday,
November 6th.

Michaelmas Term, 2 Geo. 4.

It is ordered, that the rule of Court made in *Michaelmas term*, in the 11th year of King George the First, which directs that no summons shall be attended, nor any matters transacted before any Judge at chambers or elsewhere, during the sitting of this Court at *Westminster*, be discharged.

By the Court.

During the term one of the Judges attended daily at chambers from half past two until four.

In the Matter of TAYLOR and Others.

P. POLLOCK moved for a rule nisi in this case, to discharge the rule for making the submission to arbitration a rule of court. (The facts were shortly as follows: It was a submission to arbitration, by bond under the statute of 9 and 10 W. 3, c. 15, s. 1.

A submission to arbitration, under 9 and 10 W. 3. c. 15. s. 1., may be made a rule of Court in vacation.

The

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In the Matter of
TAYLOR.

The award was dated on the 30th June last, but the submission was not made a rule of court till the 28th September, during the vacation after last Trinity term. A bill in equity had been since filed by the party against whom the award was made. He now contended, that in this case, by the words of the statute, the submission can only be made a rule of court, by producing an affidavit of the execution of the agreement, and reading and filing it in court. This shews that it must be done in court, and cannot be done in vacation, as was the case here.

Scarlett shewed cause in the first instance. The object of the statute was to facilitate arbitrations, and to prevent bills in equity. It must be construed with reference to the ordinary practice of the Court in other cases. Now, it is the practice to do business in vacation as of the preceding term. Thus a writ may be issued in vacation tested of the preceding term. As to the affidavit, that can make no difference, for that is equally required in a bailable writ, a rule for a special jury, or to compute principal and interest, all of which by the practice of the Court may be issued in vacation.

F. Pollock, in support of the rule, contended, that cause might be shewn against a rule, for making a submission to arbitration a rule of court; and that there was no authority to compel a party to shew cause before a Judge at chambers. As to judicial writs, they are at common law, and the practice of the Court may therefore regulate them. This case depends on the construction of a statute, and stands therefore on quite a different ground.

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ABBOTT C. J. If we were to grant the present application, we should do great mischief, inasmuch as the granting these rules in vacation, is a practice attended with much convenience to the suitors of the Court. It seems to me, that by construing the statute with reference to the ordinary practice of the Court, we shall give fuller effect to the intention of the legislature. The statute makes it compulsory on the Court, on the affidavit being produced to make the submission a rule of court. It is, therefore, merely a matter of form to apply for the rule. No injury is done to the other party by granting the rule, for the award cannot be enforced till the next term. All that is done, is, that a little time is gained by making the demand, and serving the rule of court during the vacation, so as to enable the party to make an application for an attachment on the first day of the next term. If we were to overturn the practice in this case, we should establish a dangerous rule, for, by parity of reasoning, no consent rule in ejectment, no rule for a special jury, or to pay money into court, could be drawn up in vacation. The consequence would be great delay in the administration of justice. This rule must therefore be refused.

Rule refused.

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Thursday,
November 7th.PHILLIPS *against* HOWGATE.

In trespass, the first count of the declaration stated, that defendant assaulted and imprisoned plaintiff; and, during such imprisonment, struck, pulled, and pushed him about. Justification, that defendant arrested plaintiff under process of court; and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c.: Held, that this latter part of the justification not being proved, the plaintiff was entitled to judgment; and, that it was not necessary to new assign the battery by the defendant.

Held, also, the second count of the declaration (which omitted the battery)

having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses, as laid in the first count.

TRESPASS. The first count of the declaration stated, that the defendant broke and entered the dwelling-house of the plaintiff, and assaulted and forced him out of his dwelling-house, and imprisoned him; and, during such imprisonment, assaulted, struck, pulled, and pushed him about in a violent manner. The second count was for an assault and false imprisonment only; and the third count was for a common assault. The defendant pleaded, 1st, the general issue; and, secondly, as to the trespasses in the first count mentioned, he pleaded a justification under a writ of attachment, issued out of the Court of King's Bench, and a warrant of the sheriff thereon, under which he peaceably and quietly entered into the plaintiff's dwelling-house, and arrested the plaintiff and imprisoned him; and, *because the plaintiff, after he had been so taken into custody under and by virtue of the said writ and warrant as aforesaid, behaved and conducted himself in a violent and outrageous manner, and could not otherwise be kept in a safe and proper manner by the defendant,* he, the defendant, was obliged to push and pull about the said plaintiff with a little force and violence, and to give the plaintiff a few blows and strokes, &c. He also pleaded a similar justification, omitting the latter part as to the battery, with respect to the second and third

counts

counts of the declaration. Replication, de injuria, &c. and issue thereon. At the trial, at the last assizes for the county of *York*, before *Bayley*. J., the defendant proved the arrest to have taken place in the manner alleged in his justification. But the plaintiff having proved a battery during the time that he was in the defendant's custody, the learned Judge thought that it was necessary for the defendant to give some evidence of outrageous conduct on the part of the plaintiff when in custody, so as to prove the latter part of the defendant's first justification; and he finally left the question to the jury, whether what was done by the defendant was more than was necessary for the purpose of keeping the plaintiff safely in custody. The jury found a verdict for the plaintiff. And now

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L. Williams, by leave of the learned Judge, moved to enter a verdict for the defendant. In this case, the plea having justified the breaking and entering, and the arrest and the imprisonment of the plaintiff, and having, to that extent at least, been proved, is a full answer to the first count; for these circumstances are the gist of the action, and the battery is only matter of aggravation; and if the plaintiff meant to rely upon it, he should have done it by a new assignment, and that, it appears, was the opinion of *Buller* J. in *Taylor v. Cole*. (a) It cannot signify that in his first justification the defendant alleges the outrageous conduct of the plaintiff as a ground for the battery, and so justifies the battery; for if what is proved amount to a sufficient justification, the having alleged other matter, not proved, will not vitiate

(a) 3 T. R. 297.

it.

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Pratt vs
against
Howgate.

it. *Spilbury v. Micklethwaite*. (a) Besides, the justification to the second count was completely proved, and only one assault was proved, and the defendant may therefore, apply the justification to that.

ABBOTT C. J. I am of opinion, that in this case the Court ought not to grant the rule. If this question were considered upon the first count of the declaration alone, it seems to me that the plaintiff would be clearly entitled to a verdict. That count contains a charge of breaking and entering the plaintiff's house, and of assaulting and imprisoning him, and, during the imprisonment, of pushing, striking, and pulling him about. To this count there is a justification; and it is contended, that the whole of the above trespasses are justified by proof being given of a writ of attachment and a warrant to the defendant, as bailiff, to execute that writ. Now, if so, I agree that the circumstance of the defendant's having put more into his justification, of which no proof has been given, will not vitiate it. But I am of opinion, that the proof given is not sufficient to justify the trespass in pushing and striking the plaintiff. In order to justify that, it was necessary to prove that part of the defendant's justification in which he states, that the plaintiff resisted when in custody. That not being done, I think the justification was not proved, and that the plaintiff would be entitled to a verdict. This would be the case, if there had been only one count in the declaration, and one plea of justification. But there is a second count, to which there is a plea of justification, which has been established. That count,

(a) 1 Term. 145.

however, was quite unnecessary for the plaintiff's case; and I think it can make no difference. Here, the plaintiff has, in his first count, stated the whole injury which he has received, and that count has not been justified. He is, therefore, entitled to a verdict.

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 DRILLING
 against
 NEWGATE.

BAYLEY J. The plaintiff proved, at the trial, the whole of his first count. The plea of the defendant, if true, would have been a good justification; and, as it seems to me, it was necessary to allege the misconduct of the plaintiff, in order to justify the pushing and striking by the defendant. For, if it had omitted such an allegation, the plea would have been demurrable. The justification, though well pleaded, was not sufficiently proved; and the plaintiff, therefore, was entitled to a verdict.

BART J. (s) concurred.

Rule refused.

(s) Holroyd J. was absent at Chambers.

DOZ on the Demise of HUMAN against PETTET. Thursday,
 November 7th.

EJECTMENT, for certain premises at *Fordham*, in the county of *Cambridge*. Plea, general issue. At the trial, before *Dallas C. J.*, at the last Summer assizes for that county, it appeared, that *John Human* was the original purchaser of the premises, and that after his death, about thirty years ago, his widow continued in possession, to the exclusion of the heirs of her husband, for twenty years' adverse possession. The declarations of a widow in possession of premises, that she held them for her life, and that after her death they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years' adverse possession.

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1821. possession for about twenty years, and then died. The defendant was the heir at law of the widow, and the lessor of the plaintiff was the heir at law of *John Human*. In order to shew that the widow's possession was not adverse, the learned Judge admitted evidence of her declarations during her possession of the premises shewing, that she held the premises for her life, and that after her death, they would go to the heirs of *John Human*. The plaintiff had a verdict; and now

Don dem.
HUMAN
against
PUTTERT.

Blossett Serjt. moved to enter a nonsuit, upon the ground that these declarations were not admissible. The declarations of a tenant for life are not admissible to shew the extent of his interest. Such declarations in order to be receivable as evidence, must be, when made, against the then present interest of the parties making them. *Peaceable v. Watson (a)*, *Doe v. Jones*. (b) In *Comyns's Digest*, tit. *Seisin*, F. 1., it is laid down "that if a man enters by a disseisin, he will be a disseisor, though he claims only for years, as tenant by statute, in dower, &c., where they have no right to it, for they cannot qualify their wrong." Here, the declarations of the widow, if she had no right, would go to qualify her wrong, and if she had a right, they would be inadmissible, as being in favour of her own interest, upon the ground previously stated.

ABBOTT C. J. All questions of evidence must be considered with reference to the particular circumstance under which it is offered. Here, the question was, whether the widow had occupied the premises adversely

(a) 4 *Trust.* 16.

(b) 1 *Compt.* 587.

for more than twenty years, and her declarations are offered in evidence to rebut the statute of limitations, and for that purpose, I think they were admissible. They were not used to shew the quantum of her estate, but only to explain the nature of her possession.

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DOX dem.
HUMAN
against
PETTAT.

Rule refused.

RAYNER *against* GODMOND.

Thursday,
November 7th.

ACTION on a policy of insurance on the ship *Neutral*, from *Wisbeach* to *Leeds* or *Wakefield*. The policy was on 230 quarters of wheat, valued at 900*l*. It contained the usual memorandum at the foot, "Corn, &c., warranted free from average, unless general, or the ship be stranded." At the trial, at the last sittings at *Guildhall*, before *Best J.*, the only question was, whether the ship had been stranded. As to that, the facts were as follows. The ship having sailed from *Wisbeach*, arrived safely at *Selly*, where, having taken out her anchors, stores, &c., she proceeded up the navigation towards *Wakefield*. In the course of the voyage, she arrived at a place called *Beal Lock*, and whilst she was there, it became necessary, for the purpose of repairing the navigation, that the water should be drawn off. The master placed the vessel in the most secure place he could find, alongside of four other vessels. In this he was assisted by the lock-keeper. The water being then drawn off, all the vessels grounded, and, unfortunately, the ship *Neutral* grounded on some piles in the river, which were not known to be there, and the cargo received considerable damage. The part of the navigation

Where, during the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water; and the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there: Held, that this was a stranding within the usual memorandum in the policy, the accident having happened not in the ordinary course of such voyage.

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RAYNER
against
GODMOND.

where she took the ground was one in which vessels usually were placed when the water was drawn off. The learned Judge was of opinion that these facts amounted to a stranding, and the plaintiff had a verdict. And now,

Campbell moved for a new trial. He contended, that in this case, there was no stranding. Here, the vessel was intentionally brought into this position, and it is impossible she can be considered as stranded, unless all the other four ships with her were equally so; for the mere circumstance of the additional damages to her, cannot make a difference. *Burnett v. Kensington*. (a) The case of *Dobson v. Bolton* (b), sittings after *Easter* term, 1799, comes nearest to this. But there the vessel in the *Wisbeach* river was driven on the piles by the perils of the sea. Here there was no such thing. This was like the case of a vessel in a dry harbour, or of those which are continually laid on the mud in coming up the *Thames*. But in those cases, it has never yet been considered that ships are stranded, and the underwriters liable for an average loss. In *Hearne v. Edmunds* (c), the Court held, that where a vessel took the ground in going up the river at *Cork*, in the ordinary course of navigation, and was damaged, it was not a stranding for which the insurers was liable. Here it was in the ordinary course of this sort of navigation, that the accident happened. *Carruthers v. Sydebotham* (d) is indeed near this case; but that decision is questionable, and ought not to be carried further.

(a) 7 T. R. 210.

(b) *Marshall on Insurance*, 239.

(c) 1 B. & B. 388.

(d) 4 M. & S. 77.

ABBOTT C. J. The case of *Hearne v. Edwards* has relieved my mind from the only remaining difficulty which I felt in this case, which was, lest it should follow, from our decision, or from that of *Carruthers v. Sydebotham*, that every settling on the ground by a vessel should be deemed a stranding; but that case was decided on a distinction which leaves *Carruthers v. Sydebotham* a valid authority; for there the accident happened in the ordinary course of the voyage; and on that ground the underwriters were held not to be liable. Here the loss did not so happen, for we cannot suppose that these canals are so constantly wanting repair, as to make the drawing off the water an occurrence in the ordinary course of a voyage. I think, therefore, that, in this case, the vessel was stranded, and that there is no reason for disturbing the present verdict.

1881.

Baron
Gibson.

BAYLEY J. This was an insurance on a perishable commodity, and the object of the memorandum was to exempt the underwriters from loss, unless there was an adequate cause for it. If, however, the ship was stranded, they were to be liable. The case of *Carruthers v. Sydebotham* is very like this. There, on the ebbing of the tide, the ship fell over and received damage, and the Court held, that it amounted to a stranding, because the ship was upon a strand. In *Hearne v. Edwards*, the ship never was on the strand, within the meaning of the parties; for there, in the ordinary course of the voyage, it was quite certain that the vessel would, by the regular flux and reflux of the tide, be left on the mud. And the fair construction of the words of this memorandum, which reconciles that case with *Carruthers*

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against
GODMORD.

v. Sydebotham, must therefore be, that when, in the ordinary course of the voyage, the ship must go on the strand, the underwriter is exempt; but where it arises from an accident, and out of the ordinary course, he is liable. That was the case here, and, therefore, the verdict is right.

BEST J. (a) If *Carruthers v. Sydebotham* had been broken in upon by subsequent decisions, it might, perhaps, have been necessary to reconsider it; but the case of *Hearne v. Edmunds*, in the Common Pleas, has confirmed it. Here, the accident producing the loss was one not to be expected. In the case in the Common Pleas, the event must happen every tide. I think a stranding may properly be said to take place, where a ship, by accident, and not in the ordinary course of the voyage, is rendered immoveable on the strand.

Rule refused.

(a) *Holroyd J.* was absent at Chambers.

Friday,
November 8th.

WILSON and Another *against* COUPLAND and Another.

Where the plaintiffs were creditors and defendants debtors to T. and Co., and, by consent of all parties, an arrangement was made that defendants should pay to plaintiffs the debt due from them to T. and Co.: Held, that as the demand of T. and Co. on defendants was for money had and received, the plaintiffs were entitled to recover, on a count for money had and received against the defendants.

ASSUMPSIT. The declaration contained two special counts, and a count for money had and received, and an account stated. Plea, general issue. At the trial, at the last *Guildhall* sittings, before *Abbott C. J.*

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the facts appeared to be these: The defendants were indebted to *Taillasson* and Co. in the sum of 768*l.*, upon the balance of accounts, for money had and received; *Taillasson* and Co. were indebted to the plaintiffs in a much larger amount; and, being so, they inclosed to the plaintiffs the account current, rendered to them by the defendants, accompanying it with a memorandum at the foot, transferring to the plaintiffs the balance of 768*l.* then due. This being notified to the defendants, a long correspondence between them and the plaintiffs took place, and in the result the defendants, who were creditors to the amount of upwards of 4000*l.* of *Taillasson* and *Doussard* (two of the firm of *Taillasson* and Co.), finding that they could not set off the one debt against the other, sent to the plaintiffs the following note, dated 14th *August*, 1820: "Three months after date we promise to pay Messrs. *Wilson* and *Blanshard*, or order, seven hundred and sixty-eight pounds, due to *Taillasson* and Co. unless otherwise provided for by an arrangement with Mr. *Colton*, in *St. Lucia*, in favour of Messrs. *W. and B.*" No arrangement was afterwards made in *St. Lucia* in favour of *Wilson* and *Blanshard*; but Mr. *Colton*, in *St. Lucia*, made an arrangement, and got the following receipt, dated 12th *September*, 1820, from *Taillasson* and Co.: "We acknowledge to have received from Messrs. *W. Coupland* and Co. the sum of seven hundred and sixty-eight pounds sterling, for balance of account due to us on the thirty-first *December* last; which said sum is to be deducted from the balance of account due to them by *Taillasson* and *Doussard* on the date aforesaid." *Abbott C. J.* was of opinion, at the trial, that on the 14th *August*, 1820, the defendants were to be considered as debtors to the plaintiffs in the sum of 768*l.*,

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 WILSON *760*
 against *760*
 COUPLAND.

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1821.

WILSON
against
COWLAND.

to be paid in three months, subject only to the possibility of intermediate arrangements in favour of *Wilson* and *Blanshard*, being made by Mr. Colton, at *St. Lucia*; and that no such arrangement having been made, the plaintiffs were entitled to recover upon the count for money had and received. The plaintiffs accordingly had a verdict. And now

Marryat, by leave, moved to enter a nonsuit. The question is here, whether money had and received will lie. For the plaintiffs failed altogether in the proof of their special counts. The case on which the plaintiffs rely is that of *Israel v. Douglas* (a). But that case is of doubtful authority. *Wilson J.* there doubted whether money had and received would lie; and in *Taylor v. Higgins*, (b), *Lawrence J.* stated that that decision had not been approved. Here no money has passed between the parties. In *Maxwell v. Jameson* (c), the Court held that money paid would not lie, unless money had actually passed. In *Barclay v. Gooch* (d), a note was given and accepted as money, and on that ground the action was held to be maintainable. This case is in effect the assignment of a chose in action. And it is distinguishable from *Israel v. Douglas*, supposing even that that case is law; for there there was an absolute promise by *Douglas* to pay the amount due from him to *Delvallè*; but here the promise is a conditional one, viz. in case no arrangement be made in *St. Lucia*. Besides, there must be a consideration for the promise, either of detriment to the plaintiffs, or of advantage to the de-

(a) 1 *Hen. Bl.* 239.(b) 3 *East*, 169.(c) 2 *B. & A.* 51.(d) 2 *Esp. N. P. C.* 571.

endants.

defendants. Now, there was no detriment to the plaintiffs; for there was nothing in the terms of the note to prevent them from suing *Taillasson* and Co. for the whole debt due to them. And there was clearly no advantage to the defendants.

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WILSON
against
COURLATIN.

ABBOTT C. J. I was not free from doubt at the trial, but I am now satisfied that the verdict is right. The facts are these: The plaintiffs were creditors, and the defendants debtors, to *Taillasson* and Co.; and, by the consent of all parties, an arrangement was made that the defendants should pay to the plaintiffs the debt they owed to *Taillasson* and Co.; and as the demand of *Taillasson* and Co. on the defendants was for money had and received, it seems to me that the defendants, by acceding to this arrangement, made themselves liable for money had and received to the use of the plaintiffs. Thus the case stands, independently of the note. But it seems to me that the note makes no difference; for although it might, perhaps, be at first conditional, yet, afterwards, the condition ceasing, it became an absolute promise; and, if so, the defendants have absolutely acceded, and are liable to the consequences of the arrangement. The verdict, therefore, is right.

BAYLEY J. The legal effect of what has taken place is this; *Coupland* and Co. are indebted to *Taillasson* and Co. to the amount of 768*l.* for money had and received. The latter being indebted to the plaintiffs, a bargain takes place, by which *Taillasson* and Co. agree, that the money had and received by the defendants to their use shall be money had and received to the use of the plaintiffs. To this arrangement the defendants assent. Then their assent makes them debtors, and

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against
COUPLAND.

liable to an action of money had and received to the use of the plaintiffs. The agreement of the 14th *August* seems to me to be absolute, and not conditional. It is in effect an agreement to give the defendants three months, in which to pay the balance, which is an advantage to them; and the defendants agree to pay it then in *England*, unless the plaintiffs are, in the mean time, paid in the *West Indies*. That is, as it seems to me, an absolute promise. I am, therefore, of opinion that this action is maintainable, and that there ought to be no rule.

HOLROYD J. concurred.

BEST J. A chose in action is not assignable without the consent of all parties. But here all parties have assented, and from the moment of the assent of the defendants, it seems to me that the balance of 768*l.* became money had and received to the plaintiffs' use. It is said that the promise was conditional. That may, perhaps, be doubtful; but supposing it to be conditional, the event has happened upon which it became absolute.

Rule refused.

Saturday,
November 9th.

DOE on the Demise of FENWICK and Others
against REED.

Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor under a judgment obtained against the then owner of the land, and defendant's family had continued in possession ever since: Held, that the original possession having been taken, not under any conveyance, the length of possession was only *prima facie* evidence, from which a jury might infer a subsequent conveyance by the original owner, or some of his descendants, but that it might be rebutted, and that the jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed,

EJECTMENT for several messuages and land in the parishes of *Simonburn, Wark, &c.* in the county of *Northumberland*. In the year 1747, *Edward Charlton*,

esquire,

esquire, under whom the plaintiffs claimed, being indebted to *John Rooke*, to the amount of 850*l.*, for which debts *Rooke* had obtained judgment, it was agreed between them, that *Rooke* should be put into the possession of the rents and profits of the estates in question, until the debts should be satisfied thereout, which agreement was carried into effect, and *Rooke* entered into, and remained in possession until 1752. *Edward Charlton*, being at that time indebted also to *John Reed*, under whom the defendant claimed, *Reed* was desirous of getting into the possession of the estates held by *Rooke*, and by a certain indenture of assignment between *Rooke* and *Reed*, the former assigned over all the debt then remaining due, and his right of possession to the estates in question, upon the payment to him of the sum of 575*l.* Under this agreement, *Reed* entered into possession, and he and his family have continued so ever since. In the year 1801, a suit in chancery was instituted by the *Charlton* family, to recover possession of the estates, upon which, in 1821, the Vice-Chancellor directed the present action to be brought, prohibiting the defendant from setting up as a defence, that the debts due or assigned to *John Reed*, deceased, were paid 20 years ago, or that the same were still unpaid. At the trial, it was proved, in addition to the before-mentioned circumstances, that the title deeds relative to these estates, (which deeds, however, extended to other estates also,) were still in the hands of the *Charlton* family, and that the lands being copyhold of the manor of *Wark*, the name of *Rooke* had remained upon the manor books till within a few years, having first appeared there in 1752. It appeared also, that moduses had been paid by the steward of the *Charlton* family, to
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DOR dem.
FENWICK
against
REED.

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the then rector of *Simonburn*, in 1779, for several estates, including some of the estates in question. There was no distinct evidence of their value. *Edward Charlton* died in 1767, leaving a widow and a son then under age. The son, *William Charlton*, married in 1778, and died in 1797, leaving a son an infant. The question for the jury was, whether, under these circumstances, a conveyance of these estates, either from *Edward Charlton* or *William Charlton* to the *Reed* family, might be presumed. *Bayley J.*, who tried the cause at the last assizes for the county of *Northumberland*, in summing up the case, after adverting to the different facts above stated, told the jury, that the real question for them to consider was, whether they believed that a conveyance had actually taken place; observing, that the loss of a deed of conveyance was less likely to take place, than of a grant of a right of way. And that, during the marriages of *Edward* and *William Charlton*, no conveyance could have been made without levying a fine; which being of record, might have been produced, if it had existed. The jury found for the lessor of the plaintiff. And now,

Hullock Serjt. moved for a new trial, on the ground of misdirection. The true criterion by which to judge in these cases, is laid down by Lord *Mansfield* in *Eldridge v. Knott* (a), where he says, "There are many cases not within the statute of limitations, where, from a principle of quieting possession, the Court has thought that a jury should presume any thing to support a length of possession. Lord *Coke* says, that an act of parliament may

(a) *Coop.* 215.

1821.

Doc dem.
Fidwick
against
Rttd.

be presumed, and even in the case of the crown, which is not bound by the statutes of limitations, a grant may be presumed from great length of possession. It was so done in *The Mayor of Hull v. Horner*. (a) Not that in such cases, the Court really thinks a grant has been made, because it is not probable, that a grant should have existed without its being on record, but we presume the fact, for the purpose, and from a principle of quieting the possession." This then is the true principle which ought to have been presented to the jury in this case. And in *Keymer v. Summer* (b), Yates J. directed the jury to presume a grant of a right of way from a possession of nearly 30 years, although it appeared, there had been an absolute extinguishment of the right of way some years back by unity of possession. If the law is to be, as stated here, it will be open in every case of a right of way, or of the enjoyment of ancient lights or water, to go to the jury on the question, whether, although possession for 20 years has been proved, they believe, that in fact any grant was ever made, and evidence of the cautious or imprudent character of the supposed grantor will be receivable. This will, in all probability, make such possession very doubtful; for no one really supposes that such grants have any existence. Besides, if the jury do really suppose a grant to have been made, the length of possession is immaterial. And there was no use in the courts laying down as a rule, that 20 years' possession would warrant a presumption. As to the observations made with respect to the fines, they were not correct. For if there had been, as probably there was a settlement on the respective marriages

(a) *Comp.* 102.(b) *Bull. N. P.* 74.

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DOE dem.
FENWICK
against
REED.

of *Edward* and *William Charlton*, there would have been no necessity for a fine. Possibly that observation, however, may have produced the verdict.

ABBOTT C. J. I am clearly of opinion, that the direction was according to law. In cases where the original possession cannot be accounted for, and would be unlawful unless there had been a grant, the rule may perhaps be different; and all the cases cited are of that description. Here, the original possession is accounted for, and is consistent with the fact of there having been no conveyance. It may, indeed, have continued longer than is consistent with the original condition. But it was surely a question for the jury to say, whether that continuance was to be attributed to a want of care and attention on the part of the *Charlton* family, or to the fact of there having been a conveyance of the estate. As the defendant's ancestors had originally a lawful possession, I think it was incumbent on him to give stronger evidence to warrant the jury in coming to a conclusion, that there had been a conveyance. As to the observations made respecting the fine, &c. I think the Judge might properly tell the jury, that, under such circumstances, they would probably find a fine levied. It is said now, that there might be a settlement, and that he ought to have mentioned that circumstance also to the jury. But it would be a new ground for a new trial, to say, that a Judge had not made every observation to the jury which the ingenuity of counsel could suggest on behalf of their client. I think the point presented to the jury was the correct one. In my opinion, presumptions of grants and conveyances have

already

already gone to too great length, and I am not disposed to extend them further.

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REED.

BAYLEY J. I thought at the trial, and I think still, that the question for the jury was, whether in fact a conveyance had ever been made. I considered it as a mere question of fact, and I called their attention to such circumstances as I thought tended to prove, or to negative it. The deeds of 1747 and 1752, were both produced, and if there had been a conveyance, it would probably have been produced also. No draft of it, or abstract referring to it, was produced. A conveyance of this sort was not likely to have been lost, if it had ever existed. It seemed to me, that the verdict was right, and that if the jury had decided otherwise, most mischievous consequences might have resulted.

HOLROYD J. Here the original enjoyment was consistent with the fact of there having been no conveyance, for it was in satisfaction of a debt. The true question was presented to the jury. In cases of rights of way, &c. the original enjoyment cannot be accounted for, unless a grant has been made; and therefore, it is, that, from long enjoyment, such grants are presumed. But even in these cases, evidence to rebut such a presumption would be admissible. I think that the direction of my Brother Bayley was correct, and that the verdict is right.

Rule refused. (a)

(a) Best J. was absent at chambers.

1821.

Monday,
November 11th.

STEWART *against* BELL.

Insurance from London to Jamaica generally. The goods insured were destined to a particular place in the island, and the usual course in such cases was for the ship to proceed to an adjoining port, and there to tranship the cargo into shallops; but no information of this was given to the underwriters: Held, notwithstanding, that they were liable for a loss occurring after such transshipment on board the shallops.

ACTION on a policy of insurance, from *London to Jamaica*, upon goods on board the ship *Nesbitt*. Plea, general issue. At the trial, at the last *Guildhall* sittings, before *Best J.*, it appeared that the goods in question were stores for the supply of a plantation called *Duckenfield Hall* estate, situate in *Plantain Garden River Bay*, in *Jamaica*. The bay is not safe for vessels drawing so much water as the *Nesbitt* did. The usual course is for such vessels to proceed to *Port Morant*, and to discharge their cargo into shallops for the purpose of being conveyed to *Plantain Garden, River Bay*. The ship *Nesbitt* arrived at *Port Morant* safely, and put part of her cargo on board two shallops, which, in their passage to *Plantain Garden, River Bay*, were lost. For this the assured claimed an average loss. The Solicitor-General, at the trial, contended, that the fact of the goods being destined for *Plantain Garden, River Bay*, ought to have been communicated to the underwriters, and that they could not, upon a policy from *London to Jamaica*, be liable for a loss occurring after the transshipment of the goods. *Best J.* was of opinion, that it was incumbent on the underwriters to inquire, for what part of *Jamaica* the goods were destined; and left it to the jury to say, whether the loss occurred in the usual course of the voyage, telling them that, in that case, the underwriters were liable. The plaintiff accordingly had a verdict. And now

The

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 BELL.

The Solicitor-General moved for a new trial; and he referred to a case of *Ferguson v. Allen*, tried before Lord Ellenborough, at Guildhall sittings after Hilary term, 1806, as in point. There the insurance was on goods by the ship *Phoenix*, at and from London to Tobago, and the goods were intended for Castara Bay, in that island, but Castara Bay not being safe in war-time, or for a ship of the size of the *Phoenix*, she went on to Cowland Bay, and sent the goods by a drogher, which was captured. There the underwriters were held not liable for the loss. That case is very similar to the present. The circumstance of the goods being transshipped, makes a considerable difference in the risk. No doubt, if the goods had been landed at Port Morant, the underwriters would have been liable for any loss by boats. Besides, the risk in droghers, when intended to be borne by the underwriters, is specially mentioned in the policy.

Per Curiam. The assured must shew, that the port to which the ship proceeds is the usual port for goods destined to the particular place. That was so here, for Port Morant was the place to which ships of the burden and draught of water of the *Nesbitt* usually proceed with goods destined for Plantain Garden, River Bay. The underwriter is presumed to be acquainted with the usual course of the voyage, and to take a premium for the risk accordingly. The policy is to cover the goods till they are landed, and the underwriter should inquire, therefore, what is the usual mode of landing the goods insured. Here, it appears to have been the usage to transship the goods into shallops. The words "including risk in droghers" have probably been added to policies for greater security; but where it is the usage of the trade,

and

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against
BELL.

and in the ordinary course of the voyage, to transship into droghers, the underwriters are liable, even though these words are not found in the policy.

Rule refused.

Monday,
November 11th:

SHEPHERD against KAIN.

Where an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding, that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened. Held, that notwithstanding the words, "with all faults, &c.," the vendor was liable for the breach of the warranty.

CASE for the breach of a warranty as to the character of a ship. The advertisement for the sale of the ship described her as "a copper-fastened vessel;" but there were subjoined these words: "The vessel, with her stores, as she now lies, to be taken with all faults, without allowance for any defects whatsoever." It appeared at the trial, at the last *Guildhall* sittings, before *Best J.*, that the ship, when sold, was only partially copper-fastened, and that she was not what was called in the trade a copper-fastened vessel. It appeared, also, that the plaintiff, before he bought her, had a full opportunity to examine her situation. *Best J.* thought that the ship, not being a copper-fastened vessel, the plaintiff was entitled to a verdict, and directed the jury accordingly. And now

The *Solicitor-General* moved for a new trial. He referred to the terms of the advertisement by which the vessel was to be taken, with all faults, and without any allowance for any defects whatsoever; and to the judgment of Lord *Ellenborough* in the case of *Baglehole v. Wallers*. (a) Here the term "copper-fastened" was only a description to the best of the seller's judgment.

(a) 10 C. 206. 120.

But

But, *per Curiam*. The meaning of the advertisement must be, that the seller will not be responsible for any faults which a copper-fastened ship may have. Suppose a silver service sold "with all faults," and it turns out to be plated; can there be any doubt that the vendor would be liable? "With all faults" must mean with all faults which it may have consistently with its being the thing described. Here the ship was not a copper-fastened ship at all; and, therefore, the verdict was right.

1891.

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Assumpsit
against
Karl.

Rale refused.

BURNYEAT against HUTCHINSON.

Tuesday,
 November 18th.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial, at the last assizes for Cumberland, before Bayley J., it appeared that the action was brought to recover the amount of a tavern bill, the charge for which amounted to 1*l.* 13*s.* There was also a charge for spirituous liquors supplied to the guests, amounting to 8*s.* To this charge it was objected, that it could not be recovered in consequence of 24 G. 2. c. 40. s. 12.; and *Gilpin v. Rendle* (a) was cited. The learned Judge was of this opinion, and the jury, under his direction, having found a verdict for 1*l.* 13*s.*, he afterwards certified, in order to deprive the plaintiff of his costs.

A plaintiff, in an action for a tavern bill, is not entitled to recover for any items under 20*s.* for spirits supplied to the guests, such sales being prohibited by 24 G. 2. c. 40. s. 12.

A *R. Jones* now moved to increase the verdict to 4*l.* by adding the charge for spirituous liquors. Here, the

(a) 1 Add. N. P. 61.

1821.

BEANVEAT
against
HUTCHINSON.

liquors were only incidental to the rest of the entertainment. The object of the statute was to prevent the sale to the consumers in small quantities, where spirits only were sold. It speaks of a collusion between the distiller and retailer, in order to extend the sale. If this be the rule, as here laid down, any security given for a tavern-bill, in which there was a charge for a glass of spirits, would be invalid; and so, indeed, was held in *Scott v. Gillmore* (a), where the spirits were supplied to the party. But in *Spencer v. Smith* (b) where the bill was given by an officer for spirits supplied to recruits, Lord *Ellenborough* was of a contrary opinion; and in *Jackson v. Attrill* (c), where the spirits were supplied to the keeper of an eating-house, to be consumed by his customers, Lord *Kenyon* held him liable. Here, the goods were supplied to other persons, and not to the defendant, who was not present at the entertainment.

ABBOTT C. J. The words of the act are free from doubt. They contain a general and absolute prohibition of the sale of spirits, unless delivered in quantities amounting to more than twenty shillings in value at one time. We are, however, desirous to narrow the construction, by introducing the qualifications of a sale to the consumer himself, and by confining it to the case where the spirits have been sold alone. But it would be a great evil to introduce such qualifications; and I think, if we did so, we should probably defeat the intentions of the legislature. The verdict must remain as it is, with all its consequences.

Rule refused.

(a) 3 Taunt. 226.

(b) 3 Campb. 9.

(c) *Peake*, N. P. C. 180.

1821.

Doe on the Demise of JAMES against BROWN.

Tuesday,
November 13th.

EJECTMENT for certain leasehold premises. Plea, general issue. At the trial, before *Abbott C. J.*, at the last assizes for *Gloucestershire*, it appeared that a fieri facias had issued upon a judgment against the defendant, and that on that occasion a lease by deed of the premises in question, was taken in execution by the sheriff, and sold and assigned to the lessor of the plaintiff. The only question at the trial was, whether this assignment by the sheriff was sufficiently proved. The assignment was in the name of *Mr. Miller*, the high-sheriff, and was executed in his name, and under the seal of the office by *Mr. Wilton*, who acted as his under-sheriff. But there was no evidence of the appointment of *Wilton*, empowering him to execute deeds in the name of the high-sheriff. The learned Judge thought that *Wilton's* acting as under-sheriff, was sufficient evidence of his appointment, and that it must be presumed that he had authority to execute all instruments necessary to be executed by the high-sheriff, and the plaintiff accordingly had a verdict. And now

Where an assignment of a lease by deed, taken in execution, was made in the name and under the seal of office of the sheriff, by *A. B.*, acting as under-sheriff: Held, that such assignment was sufficiently proved, without proving further the appointment of *A. B.* as under-sheriff, and that he had power by deed to execute deeds in the name of the sheriff.

Campbell, by leave of the learned Judge, moved to enter a nonsuit, contending, that there ought to have been further evidence that *Wilton* was under-sheriff, and that he had authority by deed to execute deeds in the name of the high-sheriff.

R 2

But

1821.

Dox dem.
JAMES
against
BRAWN.

But *The Court* thought that the evidence was sufficient, and that the under-sheriff had authority *vir officii* to execute such instruments: and they refused the rule.

Rule refused.

Tuesday,
November 13th.

RHODES against GENT.

A bill of exchange was accepted, payable at Messrs. *P. and H.*, bankers, *London*, but was not presented there for payment when due, nor until some days after: the acceptor is still liable, no inconvenience having resulted to him from the delay to present the bill.

ACTION against defendant, as acceptor of a bill of exchange drawn by the plaintiff, payable for months after date to the plaintiff's order, for the sum of 194*l.* The acceptance was as follows: "Accepted payable when due at Messrs. *P. and H.*, bankers, *London*." The declaration contained an averment, that "afterwards, and when the bill became due, to wit, &c., at, &c., it was presented at the place at which it was by the said acceptance made payable, and payment demanded." At the trial, at the last *Guildhall* sittings, before *Abbott C. J.*, it appeared that the bill in question had not been presented for payment at Messrs. *P. and H.* till several days after it became due; and it was objected that, on this ground, the plaintiffs were not entitled to recover: but the Lord Chief Justice was of a different opinion. The plaintiffs having obtained a verdict upon this, and upon another bill of exchange, to the proof of which there was no objection,

J. Parke now moved to reduce the verdict, by deducting the sum of 194*l.* Here the bill was not presented when due. It is now decided, that in an acceptance by

the present, it is a part of the contract that the bill shall be presented at the particular place; *Rowe v. Young* (a): and the question is, therefore, whether the law will not now annex to it also the condition of presenting the bill at the banker's within a reasonable time after it is due. A party, in order to take up the bill, deposits money at his banker's, and, if the bill be not presented for payment when due, or within a reasonable time after, he will be exposed to the inconvenience and risk of keeping the money there for a long period of time. And *Bishop v. Chitty* (b) is an instance of a loss occurring from this circumstance, where the acceptor was held not to be liable. *Sebag v. Abitbol* (c), was decided on the ground that it was not necessary to present the bill at all at the banker's, and being, as to that, overruled by *Rowe v. Young*, is not an authority against the application. Besides, here there is an averment in the declaration, that the bill was presented when due, which has been negatived,

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 RHODES
 against
 GARR.

ABERT C. J. It does not seem to me that the particular averment in the declaration is at all material; for the bill being payable to the order of the plaintiff, who was the drawer, it would, unless he was guilty of laches, be evidence on the account stated. The question, therefore, really is, whether a mere omission to present the bill at the banker's on the day when it is due, will discharge the acceptor; and, it seems to me, that if we were so to decide, it would produce most mischievous consequences. The case of *Rowe v. Young* goes the length of holding that a presentment is

(a) 2 B. & B. 165.

(b) 2 Str. 1195.

(c) 4 M. & S. 462.

1821.

RHODES
against
GENT.

necessary at the particular place specified; and, perhaps, it may go further, and may exonerate the acceptor, in case, by the omission to present in time, he sustains any actual prejudice; but it cannot extend to a case like the present, where no such injury is proved to have arisen in consequence of the omission to present the bill for payment when due. This rule must, therefore, be refused.

HALLORND J. (a) If this case fell within the rule laid down in the case of *Rowe v. Young*, we are, no doubt, bound by that decision; but I think it does not fall within it. The only cases in which parties have been held to be exonerated in consequence of non-presentment, are those of drawers and indorsers. This is an action against the acceptor, and, without saying what effect the proof of an actual loss sustained by him in consequence of an omission to present would have, I think he is clearly not exonerated in the present case, where no injury is proved to have arisen from what has occurred.

BEST J. If I had thought that a consequence like that contended for was deducible from *Rowe v. Young*, I should have hesitated before I pronounced the opinion which I did in that case. If a bill be accepted, payable at a particular place, the acceptor undertakes to have the money there, and to leave it there till the bill is presented; and if he does so, and in consequence of that, by the failure of the banker, he receives an injury, I think he will be exonerated, if the bill has not been presented in due time. It is like the case of a check,

(a) Bayley J. was absent at Chambers.

which,

which, if it be held till after the banker fails, will be considered as payment, in case the person giving it had money in the banker's hands at the time. I am satisfied that the case of *Bane v. Young* cannot be considered as having imposed the condition contended for in the present case. This rule must, therefore, be refused.

Rule refused.

ALEXANDER against SOUTHEY.

Wednesday,
November 14th.

TROVER for printing types and other goods. Plea, general issue. At the trial at the last *Guildhall* sittings before *Best J.* it appeared, that the defendant, who was the servant of the *Albion Insurance Company*, had in his custody in a warehouse, of which he kept the key, certain goods belonging to the plaintiff, saved from a fire at the plaintiff's house, and which had been carried to the warehouse by the servants of the Company. The only evidence of a conversion was, that when the plaintiff demanded the goods from the defendant, the latter said that he could not deliver them up without an order from the *Albion Office*. The learned Judge left it to the jury to say, whether this qualification of the defendant's refusal was a reasonable one, telling them, that if so, he was of opinion, that there was not sufficient evidence of a conversion. The jury accordingly found a verdict for the defendant. And now

Where goods, the property of the plaintiff, had been, by the servants of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them up refused to do so without an order from the company: Held, that this was not such a refusal as amounted to a conversion of the goods by the defendant.

Dennis moved for a new trial, on the ground of a misdirection. Here, there was a tortious intermeddling with the plaintiff's goods, by the defendant's refusal to

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ALEXANDER
against
Society.

deliver them up. This was therefore a conversion, and *Perkins v. Smith* (a), and *Stephens v. Edwall* (b), were both instances where servants were held liable for a conversion, although it was done for the benefit of their masters. These authorities are in favour of the plaintiff in this case.

ABBOTT C. J. I am of opinion, that in this case there should be no rule. *Perkins v. Smith* and *Stephens v. Edwall* were both cases of actual conversion by servants, in disposing of goods the property of others, to their master's use: but, here the question is, whether the refusal of the servant to deliver the goods in question amounts to a conversion of the property. This therefore is the case of a conversion arising by construction of law. I think the refusal in this case, not being an absolute refusal, was not sufficient evidence of a conversion, and that the learned Judge was right in so considering it, and in directing the jury to find a verdict for the defendant.

BAYLEY J. If the plaintiff in this case had informed the defendant, that he had previously made application to the Insurance Company, and that they had refused permission for the delivery of the property, or had told the defendant, that he expected him to go and get an order, authorizing the delivery of the property, and after that, the defendant had refused either to deliver the goods or to go and get such order, I think it would have amounted to a conversion on his part: but here the defendant had the goods in his possession as

(a) 1 Wilson, 328, (b) 4 M. & S. 260.

the agent of the Insurance Company, and he would not have done his duty if he had given them up without an application to his employers. He only gave a limited notice to me, a qualified, reasonable, and justifiable refusal to

1821.

RE-MASTERS
ALEXANDER
AGENCY
SEPT. 27.

HOLROYD J. I think the verdict in this case was right. In point of law, the goods were only in the custody of the defendant, and in the possession of his employers, the Insurance Company. If we were to hold this refusal to be a conversion, it would go this length, that if a person were to call at a gentleman's house, and to ask his servant to deliver goods to him, and the servant were to refuse to do so, unless a previous application was made to his master, it would amount to a conversion on the part of the servant. In this case, the goods came into the defendant's possession lawfully, and the refusal is only till an order is obtained from the defendant's employers. In *Perkins v. Smith*, the defendant received the goods wrongfully at first, and the conversion was by an actual sale of them. Now it is clear, that the authority of the master would not amount to a defence of that which was altogether a tortious act of the servant. The case of *Mires v. Solomons* (4) is an authority in point. There, the servant refused to deliver back some sheep which were on his master's land, and it was held to be no conversion on his part. I am therefore of opinion, that the rule should be refused.

BUT J. It thought at the trial, that I might properly have nominated the plaintiff but that the safety

1821.

ALEXANDER
against
SOUTHERN,

course was to leave the question to the jury. An unqualified refusal is almost always conclusive evidence of a conversion; but if there be a qualification annexed to it, the question then is, whether it be a reasonable one. Here, the jury thought the qualification a reasonable one, and that the refusal did not amount to conversion of the property, and I think they were right in that conclusion.

Rule refused

Friday,
November 16th.

JAMESON and Another *against* CAMPBELL.

Where a bond was given under 4 G. 3. c. 33. s. 1. by a member of parliament, being a trader, and, after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given: Held, that the bankruptcy and certificate were no discharge to the bond.

DEBT on bond. The defendant pleaded his bankruptcy and certificate, the latter being dated 22d June, 1819. The replication set forth the condition of the bond, by which it appeared to have been a bond with sureties given under 4 G. 3. c. 33, s. 1, conditioned for the payment of such sum as should be recovered in a certain action, then pending in the Common Pleas between the plaintiffs and defendant, together with such costs as should be given in the same. And it then averred, that after the bankruptcy, to wit, in *Easter* term, 59 G. 3., judgment was given in that action in the Common Pleas against defendant, for the sum of 289*l.*, and so the bond forfeited by non-payment of that sum. Demurrer and joinder. This case was argued in last *Easter* term by

Wilde, in support of the demurrer. This bond given under 4 G. 3. c. 33. s. 1. was a mere collateral security, and

1831.

James
Lynch
Campbell.

and is discharged by the bankruptcy and certificate. The difficulty arises from confounding the security and debt. The debt is not contingent, although the security is so. The moment the debt was ascertained by the judgment, it became by relation, a debt due before the bankruptcy, and as such, it was proveable under the commission, and is discharged by the certificate. The security is indeed, contingent, and depends on the event of the judgment. Here, the original debt has been released by the certificate, and the bond, which was only a security for it, cannot now be enforced. *Ca. Litt.* 201. b. For the certificate may be considered as a statutory release of the debt, *Vansandau v. Corshie* (a), *Sext v. Ambrose* (b). In *Haaster v. Campbell* (c), the Court only decided, that they would not interfere, on motion, in a case like the present. This case is analogous to bail, where the Court relieve the bail on motion, when the principal debtor has obtained his certificate.

Parte contra, referred to the statute 7 G. 4. c. 31., as the authority by which bonds were first made proveable, and to *Callowel v. Clutterbuck*, cited in *Tully v. Sparkes* (d) as proving that point. Under that statute, however, the time of payment must be certain, for a rebate of interest is to be calculated, *Ex parte Barker* (e). Here the time is clearly contingent, for it could not be ascertained when judgment would be given. There are many cases where it depends on the nature of the security, whether it be barred by the certificate, as, for instance,

(a) 3 B. & C. 413.

(b) 3 M. & S. 386.

(c) 3 B. & C. 272.

(d) 2 S. & R. 867.

(e) 3 Ves. jun. 110.

1821.

JAMESON
vs
CAMPBELL

an annuity bond, and a covenant to secure the annuity, if the bond be forfeited before the bankruptcy, it may be proved. But in an action on the covenant for not paying subsequent instalments, the certificate would be no bar. *Cotterel v. Hooke (a)*, *Ex parte Granger (b)*. So a certificate obtained subsequently to the judgment in an action on a bail bond, was held not to discharge the bankrupt from the judgment; the bail bond, not having been forfeited at the time of the bankruptcy, *Cockerill v. Owston (c)*, although it was there admitted, that the original debt was thereby discharged. Here the certificate was obtained after the judgment in the Common Pleas, and *Bouteflour v. Coats (d)*, and *Dinsdale v. Eames (e)*, shew that in such a case it is no bar. Nor will this be any hardship on the defendant, for, by suing the sureties, who are clearly liable, he may be made liable circuitously, and the law abhors circuituity of action.

Wilde, in reply, referred to *Utterson v. Vernon (f)*, as shewing that 7 G. 1, c. 31. was a declaratory act. The cases as to bail bonds are distinguishable, for the condition of the bail bond is not, as here, to pay the debt, but to do a collateral act.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court; and, after stating the pleadings, proceeded as follows:— This case was argued before us in the last *Easter* term. It is an action on a bond, given in pur-

(a) *Dougl.* 97.

(e) 1 *Burr.* 430.

(g) 2 *B. & B.* 8.

(b) 10 *Ves. Jun.* 351.

(d) *Comp.* 25.

(f) 3 *T. R.* 546.

sance of the statute 4 G. 3. c. 33. which has been since amended and rendered effectual by the statute 45 G. 3. c. 124. It appears by the pleadings that the plaintiffs having recovered judgment in the original action on a bill of exchange, the debt and costs remaining unpaid, afterwards brought their present action. Pending the proceedings in the original action, and before judgment obtained therein, the defendant became a bankrupt, and a commission was taken out against him, under which commission, but not before judgment in that action, he obtained his certificate. This certificate undoubtedly operated as a discharge in law from the debt due on the bill of exchange, and also from the costs of the action upon the bill; the costs being considered, as to this point, only as an accessory to the debt. And it was contended on the part of the defendant, that being thus discharged from the payment of all that was recovered by the judgment in the first action, he is, by consequence, discharged also from the bond given to secure the payment of what should be so recovered. But we think this consequence does not follow from the premises. There may be two securities for the same payment, one of which shall be barred by a certificate, and the other not barred. Thus, if the grantor of an annuity executed a deed of covenant for payment of the annuity as it should from time to time accrue due, and also a bond in a penal sum, with a condition for the like payment, if the bond was forfeited, so as to make the penalty a debt at law before bankruptcy, a certificate afterwards obtained discharged the grantor from all suit on the bond, as well for future as prior payments of the annuity; but such a certificate did not discharge him from

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from his deed of covenant, as it respected future payments, until the statute 49 G. 3, c. 121. was passed.

So, if a person, being arrested, give a bail-bond, conditioned for his appearance in court to answer in a suit for a debt, and become bankrupt between the execution of the bond and the time of appearance, so that the bond is not forfeited before his bankruptcy, if he do not afterwards appear to the suit, whereby the bond becomes forfeited, and an action be brought upon it, and he obtain his certificate after judgment in that action, the certificate, although it operates as a discharge from the debt for which the original action was brought, does not operate as a discharge from the judgment obtained in the action upon the bond. (a) It is true, that the condition of such a bond is not for payment of the debt; but nevertheless the bond is, in effect, a security only for such payment; and, although a judgment in the action on the bond be given for the penalty, yet execution can be taken out only for the original debt, together with costs, and not for the full penalty of the bond. And we think the bond in question is more analogous to a bail-bond than to any other instrument or deed in common use. The defendant was a member of parliament, privileged from arrest; and, consequently, could neither be required to give a bond to any sheriff for his appearance to an action, nor to give bail in court to any action in the usual way. This was found to be inconvenient; because a trader, who happened to be a member of parliament, being relieved from the fear of personal arrest, might, for a

(a) *Cockerill v. Ouston*, 1 Burr. 456.

(a) *Cockerill v. Ouston*, 1 Burr. 436.

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against
Hammell.*

long time, avoid the committing any of the usual acts of bankruptcy, and thereby delay his creditor from the relief afforded by a commission of bankrupt. To remedy this inconvenience, the statute 4 G. 4. c. 57. was passed, which, upon a bill filed in court, on an affidavit of debt, and other circumstances therein mentioned, requires the trader, within two months after personal service, to pay, secure, or compound for the debt, or to give a bond with sureties like the present; or, in default, provides, that he shall be accounted a bankrupt, and subjected to a commission at the suit of any creditor. A bond so given was undoubtedly intended as a substitute for that security, which, in other cases, is obtained through the medium of an arrest, though the statute is imperfectly framed with a view to the intended object. The effect of a certificate to discharge a bankrupt from a judgment obtained between bankruptcy and certificate, depends upon the provisions of the statute 5 G. 2. c. 30, ss. 7, and 13. Those provisions are, in their terms, confined to the original judgment, and do not extend to a security given for payment of the sum that may be thereby recovered. And, therefore, the persons who become bail in court cannot plead in their discharge the certificate of their principal; and the ground upon which the courts relieve them, on motion, is, that the bankrupt, if surrendered by them in performance of their recognizance, is entitled to his immediate discharge; and to oblige them to surrender him, in order to relieve themselves, would be a vexation to him, and a useless expence to all parties. But considering the effect of a bond like the present with reference to the law as it stood before the provision respecting sureties, introduced by the statute

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against
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49 G. 3. c. 121., the persons who joined as sureties such a bond had no means of relief. They were undoubtedly liable to an action on the bond; and compelled to pay, under the circumstances of the present case, might undoubtedly have sued the bankrupt for reimbursement; so that if he should have been discharged from a direct action upon the bond against himself, he would not have been discharged from the effect and consequences of the bond, but might have been made liable indirectly, through the medium of the sureties, and for their reimbursement. And circuitry action is always to be avoided, which would afford an additional reason for holding him liable directly, and in the first instance, by an action against himself on the bond. And as we think this case must be decided with reference to the law as it existed before the statute 49 G. 3., it is not necessary to consider the effect of that statute, which, whatever it may be, is certainly confined to matters between the sureties and their principal, and does not touch the rights or remedies of the original creditor. For these reasons, we are of opinion that judgment should be given for the plaintiffs.

Judgment for the plaintiffs.

1821.

COVERLEY against BURRELL.

Friday,
November 17th.

ASSUMPSIT for money had and received, to recover from the defendant, an auctioneer, the amount of a deposit paid on the sale of an annuity. The cause was tried at the *London* sittings after Michaelmas term, 1817, before Lord *Ellenborough* C. J., when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

On the 20th June, 1817, the defendant put up for sale the annuity in question, under the following printed particulars: "*Waterloo Bridge* annuities. Particulars and conditions of sale of an annuity, payable out of, and secured on, the tolls of the *Waterloo Bridge*, which will be sold by auction by the defendant, at *Garraway's* coffee-house, pursuant to an order of commissioners of bankruptcy. Lot 1. an annuity of 64*l.* per annum, payable half-yearly, well secured, and payable on the first toll arising from that valuable concern the *Waterloo Bridge*, which will open for passengers on the 18th day of this month, with interest thereon." At the sale the plaintiff was the highest bidder, and was declared the purchaser of lot 1. for 580*l.*, and immediately paid his deposit on that amount, agreeably to the conditions of sale, and signed a memorandum of the contract. The defendant was employed, in his character of auctioneer, to sell the annuity in question, which had been granted by the *Waterloo Bridge* Company to one *Stephens*, a bankrupt. By the deed of grant, it appeared that the company

By a public act, the *Waterloo Bridge* Company were authorized to raise money for the purpose of completing their undertaking, either among themselves, or by the admission of new members, or by granting annuities for term of years, or for life. The act did not contain any provision that the annuities should or should not be redeemable. The Company, however, in the original grant, reserved to themselves a power of redemption. Held, under these circumstances, that an auctioneer, putting up to sale one of these annuities, was bound, in his particulars of sale, to describe it as a redeemable annuity.

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against
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reserved to themselves a right to redeem the annuity at the expiration of five years.

Sugden, for the plaintiff. The auctioneer ought to have disclosed by his particulars the redeemable quality of this annuity. The purchaser might fairly assume that it was irredeemable, especially as the act of parliament enabling the commissioners to grant these annuities, although it contains a form of grant, does not expressly give a power of redemption. He was stopped by the Court.

Barnewall, contra. The rule of law, "caveat emptor," applies to this case. The annuity was granted originally by the *Waterloo Bridge Company*, for the purpose of raising money to enable them to carry out a great public undertaking; and although a power of redemption does not necessarily belong to every annuity, yet it almost universally attaches to an annuity granted for such a purpose; for the mode of raising money by annuity is resorted to only when it cannot be obtained upon mortgage or by other means. The circumstances under which this annuity was granted must be taken to have been known to the purchaser; for it was granted originally under the provisions of a private act of parliament, the 53 G. 3. c. 184. By section 1 of that act, the company are authorized to raise £200,000. for the purpose of completing their works either among themselves or by the admission of new subscribers; by section 7. they are authorized to raise it by mortgage; and by section 8. by granting annuities payable out of the rates, either for a term of years or

1801.

COYALTY
ANNY
BUTTS.

The purchaser, therefore, in this case, must be considered to have known that he was purchasing an annuity for life or years (which would pay him 11 per cent. on his purchase-money), originally granted by statute for the purpose of enabling them to carry on a great public work. He ought, therefore, to have known that the original grant of an annuity must, according to the common course of such dealings, have contained a power of redemption; or, at least, that fact was so very probable as to throw upon him the obligation of making enquiry upon the subject.

ANONYM. C. J. I am of opinion that the plaintiff is entitled to recover. It is of great consequence to the public that auctioneers, who take upon themselves to describe in their particulars the property to be sold, should truly describe it; for the buyers act on the faith of those descriptions. We ought not, therefore, to be at fault in curing the defects which are apparent on the face of these particulars. It is true that an annuity may be redeemable, but it is not necessarily so; and it is not redeemable, unless there be a special provision to that effect in the deed granting it. The purchaser had no reason to suppose, in this case, that the annuity was redeemable. He could not have learnt that from the act of parliament, which contains no provision to that effect. And, under these circumstances, it appears to me that he might naturally expect that he was to purchase an absolute, and not a redeemable annuity. I am of opinion that, in the present case, it was incumbent on the auctioneer, who offered the annuity for sale, to describe it as a redeemable annuity. There must, therefore, be judgment for the plaintiff.

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BAYLEY J. I am of the same opinion. If this had been a common annuity, it might naturally have been supposed that a purchaser would make enquiries to its nature; but, here, it was granted under provisions of an act of parliament, and the purchaser, by looking at the act, might reasonably expect to find the nature of the annuity. Now, by the 8th section of the act, he would learn that the company were at liberty to grant any annuity, for any term of years or for the life of the grantee, or his nominee; and that, in the 9th section, a form of grant is given. Now, both these clauses being silent as to the annuity being redeemable, he would be fully warranted in concluding either that the annuity on sale was for a term of years or for a life, and he could not have any idea that it was a redeemable annuity. I think, therefore, the plaintiff is entitled to recover back his deposit.

HOLROYD J. Under the provisions of this act, a purchaser would naturally expect that this annuity was not redeemable. I, therefore, concur in thinking that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

(a) Best J. was absent in the Bail Court.

1821.

KIPLING *against* TURNER.Tuesday,
November 20th.

DEBT on bond. The defendant craved oyer of the condition, which was as follows: Whereas *G. N.*, *L. T.*, and *I. T. N.*, have lately filed their bill of complaint in chancery, against *R. M.* and *I. S.*, defendants, touching the matters therein contained. Now the condition of this obligation is such, that if the above bounden, *George Turner*, his heirs, &c., do, and shall well and truly pay, or cause to be paid, all such costs as the said Court shall think fit to award to the defendants on the hearing of the said cause, or otherwise, then this obligation to be void, &c. And he then pleaded, first, that the said Court, in the said condition mentioned, had not awarded any costs to the said defendants, *R. M.* and *I. S.*; and secondly, that after the execution of the bond, and before the said Court had awarded any costs to the said *R. M.* and *I. S.*, to wit, on, &c. at, &c. the said *I. S.* died. Replication to the first plea, that after the death of *I. S.*, by the custom and practice of the said Court, he, the said *R. M.*, was entitled to certain costs. And that after the death of *I. S.*, by a certain order of the said Court, made in the said cause, it was ordered, that the plaintiffs should pay to the said *R. M.* his costs, to be taxed, &c. and that the costs were afterwards taxed at 3*8*l., and that defendant had not, though requested so to do, paid the same. And as to the second plea, demurrer. The defendant also demurred to the replication to the first plea.

The condition of a bond, after reciting that *A.*, *B.*, and *C.* had filed a bill in equity against *D.* and *E.*, was, that the obligor would pay all such costs as the Court of Chancery should award to the defendants, on the hearing of the cause: Held, by three Justices (*Abbott C. J.* dubitante), that the death of *E.*, before any costs awarded, could not be pleaded in discharge of the bond.

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Kipling
against
Tuxton.

J. Williams, for the plaintiff. The question here whether the bond be discharged by the death of one of the parties, who were defendants in the original suit, chancery. These conditions are to be construed liberally, and every reasonable intendment must be made effectuate the object of the parties. That object in the case was clearly, to indemnify the plaintiffs in the suit in equity against any costs they might incur therein. There is not any thing in the condition which at all refers to the death of one of the defendants in equity, as an event in which the bond is to be at an end. The condition is to indemnify against any costs, if they accrue. In *Com. Dig. Tit. Condition L. 1.*, it is laid down, that if a condition be to ensue two before such day, and one dies, the party ought to ensue the other.

Littledale, contra. This is the case of a surety, and the condition is, that he will pay all such costs as shall be awarded to *B. M.* and *L. S.* and in such a case, *L. S.* dies the bond is discharged. The principle on which cases of this sort depend, is founded on *Lord Arlington v. Merriake*. (a) And *Wright v. Russel* (b), *Barker v. Parker* (c), and *Strange v. Lee* (d), are authorities to shew, that a bond given for the faithful discharge of clerk's duties to *A.* and *B.*, is discharged by either the death of *A.* or *B.*, or by a change of the firm, by introducing a third person. And the reason given, is, because the surety might have a special reliance on *A.* or *B.*, which induced him to enter into the obligation. So again, he will not be liable beyond the particular time

(a) 2 Sound. 414, g.

(b) 3 Wilm. 556. 9 Black. 954. 5 C.

(c) 1 T. R. 287.

(d) 3 East, 484.

mentioned in the condition. Here, the death of A & B may perhaps have been a cause of the costs having been incurred. And there is no averment in the replication, that the costs accruing were such as would have accrued in case A & B had survived.

1801.

Reported
as follows
Trotter.

AMERY C. J. My mind is not quite satisfied upon this case, because, the situation in which defendants in equity stand as to costs, is not the same as at law. For, in equity, the Court sometimes orders the plaintiffs to pay costs to one defendant, and to receive them from another, and if that had been done here, this defendant would have received the advantage. I doubt therefore, whether we can properly introduce the words "or either of them," into the condition of this bond, in order to satisfy the intention of the parties. The inclination of my opinion is, therefore, in favour of the defendant; but, as the rest of the Court are of a different opinion, and entertain no doubt upon the subject, the judgment must be for the plaintiff.

BAILEY J. This bond is not conditioned to pay such costs as the court of equity shall award to B. M. and J. S. by name, but to pay such costs as shall be awarded by that court to the defendants, and I think, that the meaning of that is, that the present defendant undertakes to pay all such costs as shall be awarded by the Court to those who at that time fill the character of defendants in equity. The case is very different where persons are described by character, and where they are described by name. If, for instance, a man makes A., B., and C., his executors, and directs that A., B., and C. shall sell his property, then if A. dies,

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KIRLING
against
TURNER.

B. and *C.* cannot sell it, but if he directs his execut to sell it, *B.* and *C.* may do so. In this case, therefore I think that if any costs were awarded to persons filling the character of defendants in equity, they would be within the bond, and here it appears by the replication that there were costs so awarded. I am therefore of opinion, that there should be judgment for the plaintiff.

HOLROYD J. I entirely agree in the opinion pronounced by my Brother *Bayley*. It appears, that here there were three persons filling the character of plaintiffs, and two, that of defendants in equity, and the intention appears to me plainly to have been, that whatever costs the plaintiffs in equity were compelled to pay should be repaid by this defendant. I think, therefore, that the plaintiff is entitled to our judgment.

BEST. J. The object of the Court is to ascertain the intention of the parties, which it is not very easy in this case to do. I think, however, that it was this. The defendant undertook, that if the persons mentioned in the condition would file a bill in equity, he would be responsible for all the costs which might be awarded against them by the Court. I agree, therefore, that in this case, the plaintiff ought to recover.

Judgment for the plaintiff. (

(a) See *Bayley v. Lucas*, 1 Term Rep. 291. (note a.), where the security was given to the banking-house, and not to the partners by name, and there the surety was held to be liable, notwithstanding a change of the firm.

Lewis and Others against OVENS.

1821.

OVERS
AND
AND

CAMPBELL had obtained a rule to shew cause why the defendant, who had sued out a writ of error in this case, should not give security for costs, or why the plaintiffs should not be at liberty to proceed on the judgment, notwithstanding the writ of error. It appeared that the defendant resided in *Ireland*, and that the writ of error was brought after a sham plea, and judgment upon demurrer to the replication.

Where a plaintiff in error resides out of the jurisdiction of the Court, he may be compelled to give security for costs; and, in default thereof, the defendant in error will be permitted to proceed on his judgment, notwithstanding the writ of error.

Marryat and *Chitty* shewed cause, and contended, that this was distinguishable from the cases in which the Court requires security for costs, where a plaintiff resides out of the jurisdiction of the Court. Here, if the security be not given, the party will be liable to be taken in execution. In other cases, the proceedings are only stayed in the mean time.

Campbell, contra, stopped.

ABBOTT C. J. This is quite analogous to the cases referred to, and it is even a more favourable case for such an application. The present rule, if made absolute, will not stop the party from proceeding in his writ of error, if he has any substantial ground for it. But unless he gives security for costs, the other side may, in the mean time, proceed on their judgment.

Rule absolute.

1821.

Thursday,
November 7th.

BLUNDELL against CATTERALL.

The public have no common law right of bathing in the sea; and, as incident thereto, of crossing the sea shore on foot, or with bathing machines, for that purpose.

TRESPASS, for breaking and entering the plaintiff's close, (describing it, first, as a close called the *Sea-Shore*, within the manor of *Great Crosby*; secondly, as a close between the high-water mark and the low-water mark of the river *Mersey*, in *Great Crosby*, in the county of *Lancaster*;) and with feet in walking, and with the feet of horses, and with the wheels of bathing machines, carts, and other carriages, passing over, tearing up, damaging the sand, gravel, and soil of the said close. The defendant pleaded, as to the trespasses committed on the close called the *Sea-Shore*, and on that between the high and low-water mark, a public right of way on foot, and with cattle, carts, and carriages; and secondly, as to the same trespasses, that all the liege subjects of our lord the king, had been used and accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy the right and liberty of bathing in the sea from time to time, being over and upon the whole or any part of, or adjoining to, the said close, in which, &c., at all seasonable and convenient times, for their health and recreation, and for that purpose, of going and returning, passing, and re-passing into, through, over, and along the said close, in which, &c. on foot, and with their servants, and with carriages and bathing machines, and horses drawing the same to the sea and back again; and of staying in and upon the close a necessary and convenient time for the purposes of bathing as aforesaid: And thirdly, as to

part

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against
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part of those trespasses, a right of bathing and of passing on foot only. The plaintiff took issue on these pleas; and also newly assigned that the defendant committed the trespasses on other occasions, and for other purposes than those in the pleas mentioned, and out of the highway in the first set of pleas mentioned. Issue thereon. At the trial, at the last *Lancaster* assizes, before *Bayley J.*, a verdict was found for the defendant on the first set of pleas; and for the plaintiff on the new assignment, and on all the other pleas, subject to the opinion of the Court on a special case. The plaintiff was the Lord of the manor of *Great Crosby*, which is bounded on the west by the river *Mersey*; an arm of the sea. As lord of the manor, he was the owner of the shore, and had the exclusive right of fishing thereon with stake nets. The defendant was the servant at an hotel, erected in 1815, upon land in *Great Crosby*, fronting the shore, and bounded by the high-water mark of the river *Mersey*, the proprietors of which kept bathing machines for the use of persons resorting thither, who were driven by the defendant, in machines, across the shore into the sea, for the purpose of bathing, and the defendant received a sum of money from the individuals so bathing, for the use of the machines, and for his service and assistance. No bathing machines were ever used upon the shore in *Great Crosby*, before the establishment of this hotel, but it had been the custom for the public to cross it on foot, for the purpose of bathing. There was a common highway for carriages along the shore, and it was proved, that various articles for market were occasionally carted across the shore, although the more common mode of conveyance for such things was by a canal, made about forty years ago. The defendant contended for a common law right for

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BLUNDELL
against
CATTERALL,

for all the king's subjects to bathe on the sea-shore, and to pass over it for that purpose, on foot, and with horses and carriages. The case was argued in last Easter term,

Gregson, for the plaintiff, contended, that there was no common-law right to bathe, independently of usage in the particular place; first, from the silence of the authorities; secondly, because such a right was contrary to analogies; and, thirdly, because it was contrary to established and acknowledged rights. As to the first point, it is sufficient to refer to Lord Hale's treatise *De Jure Maris* and *De Portibus Maris*, where, in chapters 5 and 6, he enumerates the different public and private rights applicable to the sea-shore, and creeks and arms of the sea, and does not include this right. As to the second, it is laid down in Lord Hale, *De Portibus Maris*, pp. 73 and 76, and in *Morgan's* case, p. 51 of the same book, that the public have no right to unlade goods, or to moor or tow their vessels on the shore, without leave. The authority of *Bracton*, lib. i. c. 12. s. 6., cannot have much weight, for it is only copied from the civil law, and was overruled in *Ball v. Herbert*. (a) As to the third point, it is clear that such a right would interfere with the improvement of the shore by the lord; and that this right is in the lord appears from Sir Henry Constable's case, 5 Rep. 107., *Hammond v. Digges*, Dyer, 326., *The Attorney-General v. Roll and Others*, cited Hale, p. 27., *Stockwell v. Terry*, 1 Ves. sen. 115., and *Warwick v. Collins*, 2 M. & S. 361. (b) So, all wharfs, quays, &c. erected on the shore, might be pulled down;

(a) 3 T.R. 251.

(b) The references are to Lord Hale's treatises, as published by Mr. Blagden in his Law Tracts.

for no length of time can legalize a nuisance, which *these* would be, if this right existed. *Voight v. Winch*, 1 Barn. & Ald. 664., *Bar v. Cross*, 3 Alampb. 224.

1821.

—
Bloxer
against
Carterall

Joy, contrâ. The case of *Ball v. Herbert* is very distinguishable from the present. That case only applied to the banks of a navigable river, which stand obviously on a different foundation from the sea-shore. On the banks of the river, where the right of towing was claimed, no general right of highway was contended for; whereas, in the present case, the locus in quo is a public highway. The claim there made, if maintainable, would have established the right to tow on both sides of all navigable rivers, although this is contrary to general practice, and although most of the navigable rivers in the kingdom have been made so under different acts of parliament, passed subsequently to the lawful construction of dwelling-houses, &c. upon their banks. Whereas the barren sands of the sea-shore, covered by the sea every tide, are no where so appropriated. The fact, too, that such acts have been repeatedly passed to make rivers navigable, and to appoint towing-paths on their banks, within certain limits, shews that such paths did not previously exist at common law. An act of parliament was not considered necessary to render the open sea navigable, or its shores accessible. The distinction between navigable rivers and the sea-shore is frequently noticed by Lord Hale, pp. 6 and 7. This right is not contrary to analogies; for the public, generally speaking, have a right to fish on the coast, and on arms of the sea, and to cross its shores for that purpose, although that right may, in some few instances, have been interfered with, where individuals claim under a grant from the crown, or by prescription, which presupposes a grant.

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a grant. Lord *Hale*, pp. 11. 19, 20., and *Bagott v. Orr*. (a) The right to bathe in the sea is of great moment to the public, and less liable to private appropriation than the right of fishery. Although private individuals may possess advantages connected with the shore, still they cannot possess any which can authorize them to preclude the public from their permanent right of free passage over it. The erection of weirs, although in some instances tolerated under ancient grants, has been repeatedly treated and considered by the law as a nuisance, on the ground that they interfere with the public rights of fishery. In *Weld v. Hornby* (b), the substitution of a stone weir for one of brush-wood, was held to be an illegal encroachment, because it prevented the ascent of fish up the river. In *Bagott v. Orr*, the right of the public to pass freely over the sea-shore for any common use and enjoyment thereof, is fully recognized. The authority of *Bracton* is expressly in point, and fully establishes the position, that the sea-shore is as common to all as the sea itself; and as the sea is open to every one, it follows, that if the passage from *Bracton* be good law, that the shore is equally so. His authority, indeed, was questioned in *Ball v. Herbert*. Lord *Hale*, however, in his *History of the Common Law*, mentions *Bracton* as a good authority. He was Chief Justice of *England* in the reign of *Hen. 3.*, and from his station, therefore, must be taken to be no mean authority of what the common law was in his day. The passage referred to, is cited by Lord *Hale* in his treatise, *De Portibus Maris*, c. 7., p. 88., and also in *Callis on Stairs*, p. 54. It is no objection to the passage, that *Bracton* has availed himself of the very

(a) See 4 *Pull.* 478.

(b) 7 *East*, 186.

of *Justinian*. It was impossible, that he should have found the principles there laid down in the law, or in any other well digested code, for they are directly derived from the law of nature, and are inseparable to the enjoyment of those common rights which are most susceptible of private appropriation, and as such, are to be found in the written law of all civilized nations, *Grotius De jure belli et pacis*, c. 2. ss. 3. & 4., and *Mare liberum*, *passim*. *Jord. Hale* c. 6, p. 78., is an authority to shew a general right in the public to the free use of the shore for all useful purposes. As to the third objection, that the right claimed in this case, is incompatible with acknowledged private rights, such as the erecting of wharfs, quays, and embankments, the right now claimed being the more ancient, the more general, and the more important of the two, is paramount. Besides this general freedom of passage over the shore is not incompatible with the occasional construction of quays or wharfs, they are merely, in point of fact, so situated as to offer no obstruction to persons crossing the shore for a lawful purpose, while they mainly contribute to another very material and equally lawful enjoyment of it, in the facilities afforded by them to the landing and loading of goods, and such buildings are allowed from the necessity of the case, and for the public good, and are not instances so entirely *juris privati* as not to be subject to public regulation, being affected with a public interest. And if they should be so situated, as instead of conducing to the better use of the shore, to become actual obstructions thereto, they may be treated as nuisances. *Jord. Hale*, c. 7. *de portibus maris*, ss. Besides any argument derived from the dif-

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difficulty of reconciling the erection of wharfs or emplacements, with the general right to pass over the shore for the purpose of bathing, must apply equally against the right to pass over it for the purpose of fishing, the latter is admitted to exist. It is clear, that the common law right to bathe exists, from the universal practice in the whole realm, which is a proof of what the common law is, the usage of a place being a custom, but the whole realm being the common law. The authority of *Bracton* is expressly in point, and establishes the position that the sea-shore is as common to all as the sea itself. If so, then the absence of any authorities, shews that it remains the common law now; for it cannot be shewn to have been since altered. The right to the sea was originally in the king, and when in his hands was subject to this right. No subject claiming under him can claim a greater right than the king had. As to the right to bathe from machines, it exists as an accessory to the general right, for many persons, from infirmities or other circumstances, might otherwise be deprived of a beneficial practice.

Cur. adv.

And now, there being a difference of opinion, the Court delivered their judgments seriatim.

BEST J. The question in this case is, whether there be a common-law right to pass over the shore for the purpose of bathing in the sea. It will not be disputed that the sea, which has been called the "Great high way of the world," is common to all. Bathing in the sea, done with decency, is not only lawful, but proper, and often necessary for many of the inhabitants of this country.

There must be the same right to cross the shore in order to bathe as for any other lawful purpose. We are, therefore, now to decide, whether the public are excluded from passing, except at particular places, over the beach to the sea without the consent of some lord or manor. That this will be the consequence of our deciding in favour of the plaintiff, has been already admitted at the bar, and must be conceded by every one. I am fearful of the consequences of such a decision; and, much as I dislike differing from the rest of the Court, I have thought it my duty to declare that I cannot assent to it. We have been told that lords of manors will find it their interest to indulge the public with the privilege of going on or over the sands of the sea, and that judges and juries will check the vexatious exercise of the right to exclude them. But the free access to the sea is a privilege too important to *Englishmen* to be left dependant on the interest or caprice of any description of persons.

It is agreed by all, that the sea-shore was at first appropriated to the king, from whom the right to it must be derived. The present state of the shore shews the manner in which the crown must have used it. Some parts of it were held exclusively by the crown for the purposes of fisheries, harbours, warehouses, &c. But the greatest part was left open as a common highway between the sea and the land. This is the state in which it continues to this day, and in which, from its general sterility, it must ever continue. From the state of the greatest part has arisen the general rule, or common-law right, and the state of the portions exclusively occupied has occasioned the exceptions. The claim of the public to a right of way over the beach

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stands on the general law, and a person who will disturb this public right in any particular part of it, must establish his right to do so by shewing, first, that the defendant had an exclusive possession of such part, and that his right to such exclusive possession has been conveyed from the crown to such person. This has been the course in which persons have proceeded who have attempted to shew any exclusive right, either in arms of the sea or in the shore. In *Lord Fitzwalter's* case (a), *Hale* says, "An arm of the sea is primâ facie common to all, and if any will appropriate a privilege to himself, the proof lieth on his side; for in case of an action of trespass brought for fishing there, it is primâ facie a good justification to say, that the *locus in quo* is *brachia maris, in quo unusquisque subjectus dom. regis habere debet liberam piscariam*." So, in *Bagott v. Ormrod*, the Court of Common Pleas held, "that if the plaintiff had it in his power to abridge the common-law right of the subject to take sea-fish upon the shore within the manor, he should have replied that matter specially. The same doctrine is laid down in *Carter v. Murcott*. It may be observed, that in the case now under consideration it is expressly found, that the soil of the locus in quo is in the plaintiff; but I say the plaintiff must be in the plaintiff, as it was in the king; for the grantee cannot have a greater interest than the grantor had. The king had the right of soil in the shore in general; but the public had a right of way over it, and the king's grantee can only have it, subject to the same right. In the treatise of *De Jure Maris*, p.

(a) 1 Mod. 105.

(b) 2 Bos. & Pull. 479.

(c) 4 Burr. 2162.

Lord Hale says, "The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers and arms of the sea are affected for public use." If the owners of the soil must claim by prescription, can they establish an exclusive right? Did they ever possess an exclusive right? For, as Lord Hale says, the civilians tell us truly, "*Nihil præscribitur nisi quod possidet.*" (a) As the king might have granted a right in particular parts of the shore, so, either he or his grantee of the soil of any part of the shore, may take the products of the shore, provided their removal does not impede the public right of way. The owner of the soil of the shore may also erect such buildings or other things as are necessary for the carrying on of commerce and navigation on any parts of the shore that may be conveniently used for such erections, taking care to impede, as little as possible, the public right of way. This is not more inconsistent with a public right of way over it, than the right of digging a mine under a road, or the erecting of a wharf on a river, are inconsistent with the right of way along such road or river. The former does not interfere with the use of the road; and although the latter, in order to be useful, must be carried out beyond the high-water mark, and, whilst the tide is up, must somewhat narrow the passage of the river; yet, such wharfs are necessary for the loading and unloading of vessels, and the right of passage must be accommodated to the right of loading and unloading the craft that pass. The law in these, as in all other cases, limits and balances opposing rights, that they

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(a) *De jure maris*, p. 52.

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may be so enjoyed as that the exercise of one is not injurious to the other. The civil law, copying, in respect, from the law of nations, allowed any one to build on the sea-shore (there being, under that law, lords of manors to claim the soil), but imposed on builders the condition that the law of *England* imposed on the owners of the soil, that is, that their building should not interrupt the right of way. *Digest, l. tit. 8.* "In littore juré gentium ædificare liceret, sed usus publicus impediret."

The universal practice of *England* shews the right of way over the sea-shore to be a common-law right. All sorts of persons who resort to the sea, either for business or pleasure, have always been accustomed to pass over the unoccupied parts of the shore with such carriages as were suitable to their respective purposes, and no lord of manor has ever attempted to interrupt such persons. Goods could not be landed or loaded except at particular places, but this restraint was imposed by laws made for the protection of the revenue, and the security of the realm, and is not the consequence of any rights in the owners of the soil of the shore. Men have landed from boats, drawn their boats on the sands during their stay on shore, and embarked again in their boats. Persons have at all times, at their pleasure, walked or ridden on the sands. Men have, from the earliest times, bathed in the sea; and, unless in places or at seasons when they could not, consistently with decency, be permitted to be naked, no one ever attempted to prevent them. So far from the law allowing lords of manors to restrain persons from bathing, it will give them every facility for this recreation. Bathing promotes health. By bathing those who live near the sea are taught their first duty

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namely, to assist mariners in distress. They acquire, by
 bathing, confidence amidst the waves, and learn how to
 seize the proper moment for giving their assistance. It is
 and as a fact, in this case, that it has been the custom
 for the public to cross the spot in question on foot for
 purpose of bathing. Bathing machines were used
 before my time, and I believe before that of the oldest
 person now alive, and I think the use of them is essen-
 tial to the practice of bathing. Decency must prevent
 females, and infirmity many men, from bathing, ex-
 cept from a machine. Attempts have been made to
 make those who use machines pay some acknowleg-
 ment to the lord of the manor where they were used;
 but I cannot find that any of those attempts have yet
 succeeded. I shall presently shew from authority, that
 the right to fish is only a part of the general right of
 the subjects of *England*. Persons have also crossed
 the beach for the purpose of fishing in the sea, and
 have brought back their fish over the beach, both
 on horses and in carriages. These acts of the fisher-
 men are instances in support of the common-law right
 of fishing.

The practice of a particular place is called a custom.
 A general immemorial practice through the realm is the
 common law. Many of our most valuable common law
 rights have no other support than universal practice.
Ball v. Herbert (a), Lord Kenyon says, "Common
 rights are either to be found in the opinions of
 lawyers, delivered as axioms, or to be collected from the
 universal and immemorial usage throughout the coun-
 try." The instances put by me, sufficiently demonstrate

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(a) 3 T. R. 261.

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the existence of an universal custom in favour of a right of way over the sea shore.

It has been at all times the policy of this country to encourage navigation. The free passage of the sea is essential to the convenience and safety of navigation. Cases of immediate necessity or imminent danger be said to form exceptions to general rules; but there are many cases in which there is neither immediate necessity nor imminent danger, in which boats must be sent between ships at sea and the shore, letters and provisions must be sent, passengers require to land or to embark, intelligence necessary to the further prosecution of a voyage is desired, or a pilot is wanted. For many leagues along the coast, there is no public passage marked out, by which persons may go to or from the sea. But fixed places do not do. Winds or currents make it necessary, that the greatest part of the shore should be left open for persons to land on, and embark from. There is no statute or rule of common law, that secures the right of passage over the shore for purposes connected with navigation. Those who have passed over the shore for those purposes, have been trespassers, if they were not justified under the general common law right of free passage. Is it to be supposed, that, in a country, the prosperity and independence of which depends on navigation, that which is so necessary to navigation as a road for lawful purposes to the sea, should not have been secured to the public, particularly when it might be done without injury to the interest of any individual?

There is no clear and express declaration on this point, either in the statutes or in the common law. But this right is so important to the best interests of the country, that had not the constant exercise of

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been considered sufficient to establish it, the legislature would no doubt have declared it to be in the people of England. *Bracton*, lib. 1. cap. 12. sec. 6., says, "Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, fauces arboribus ibi natis religare, onus aliquod in iis reponere, cuivis liberum est, sicut per ipsam fluvium navigare: sed proprietates earum illorum est quorum predia adherent, et eadem de causâ arbores in eisdem natæ eorundem sunt: et hæc intelligenda sunt de fluminibus perennibus, quia temporalia possunt, esse privata." This passage proves all that I am attempting to establish. It shews that all persons have a common right on rivers; that the right of fishing exists only as a part of that common right, and that the banks of rivers are as much open to the use of the public as the rivers themselves. The passage has been supposed to prove too much, and therefore it has been said, that its authority cannot be relied on. Mr. Justice *Buller*, speaking of it, in *Ball v. Herbert* (a), says, "that it plainly appears to have been taken from *Justinian*, and is only part of the civil law; and whether or not it has been adopted by the common law, is to be seen by looking into our books; and there it is not to be found." I admit that *Bracton* agrees with the civil law, and I must add, with the law of all civilized nations. *Selden*, who wrote his "*Mare clausum*," to prove that an exclusive right might be acquired in parts of the sea, admits that the sea was originally common to all, and

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(a) 5 T. R. 265.

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in *lib. 1. cap. 2.*, he has collected from the works of the learned of all nations, as well philosophers, divines, and poets, as lawyers, that the sea and its shores were common to all men, as much so as the air that blows over them. This I think proves, that the doctrine is reasonable, and ought to be adopted into our law, unless there be something in our particular situation to exclude it; and so far from this being the case, there never was a country, the local situation of which, and the habits and interests of the inhabitants of which, so much required such a law.

But our books shew, that this passage has been adopted into our law. Mr. Justice *Buller* tells us, that *Callis* quotes it as *English* law, and I have often heard Lord *Kenyon* speak with great respect of that writer. *Bracton* has not stated this as civil law, he has made it part of his book, *De legibus et consuetudinibus Angliæ*. He was Chief Justice of *England* in the reign of *Henry* the Third; and Lord *Hale* (*Hist. of the Common Law*, ch. 7.,) says, that in his time the common law was much improved, and the pleadings were more perfect and orderly than in any preceding period of our history. Surely such a man is no mean authority for what the common law was at the time he wrote. In *Fortescue*, p. 408., Lord Chief Justice *Parker* says, "As to the the authority of *Bracton*, to be sure many things are now altered, but there is no colour to say, that it was not law at that time, for there are many things that have never been altered, and are law now." As law is a just rule fitted to the existing state of things, it must alter as the state of things to which it relates alters. I do not say, that the whole of the passage in *Bracton* is now good law: it was all good law at the time he wrote,

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and all of it that is adapted to the present state of things is good law now. It is objected, that *Bracton* says, "that any one may, in any river, fasten vessels with ropes to the trees on the banks, and unload the cargoes on the banks." Undoubtedly the public cannot now pretend to claim this right in all navigable rivers, Many rivers have been rendered navigable since *Bracton* wrote, which in his time were private streams. The public have no greater right on the banks of such rivers, than the owners of the adjoining lands granted them when such rivers were made, from private streams, public rivers, and the extent of the grant must be ascertained from usage. This is the case with a new made road. If one dedicates to the public a right of way over his lands, the public must take the road with gates on such parts of it as the owner thinks proper to erect at the time he makes the dedication. But *Bracton* speaks not of newly made rivers, but of such as were always navigable, and the banks of which had been as open to the public as their waters. This I take to be the law with all inland navigations in the reign of *Henry the Third*. These, like the sea and its shores, were then the property of the public, and the right of the public in them was not acquired by any compromise with the interest of any individual. On some rivers that have been navigable from time immemorial, the public using but one of the banks for a towing path, the other has been usefully occupied by the owner of the adjoining land, and so an exclusive right has been established to the part so occupied. But the barrenness of the greatest part of the sea shore has prevented it from becoming the subject of exclusive property. It is useful only as a boundary and an approach to the sea; and therefore,

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ever has been, and ever should continue common to all who have occasion to resort to the sea. Thus, the case of *Bail v. Herbert* is distinguished from the present, and it must be recollected, that, in that case, Lord *Kenny* said, "Some of the passages in Lord *Hale* which seem to favour the common law right, are rather applicable to banks of the sea, and to ports; and it is part of the king's prerogative to create ports, which was lately exercised at *Liverpool*." In *Broke's Abridgement*, tit. *Customs*, pl. 46., all the Judges agreed, "that fishermen may justify going on the land adjoining the sea, to fish in the sea; for this is for the good of the commonwealth, affording sustenance to many persons, and is the common law." If the right of fishing is only a part of that more general right for which I am contending, as appears from the passage in *Bracton*, and will appear from Lord *Hale*, then this is a decision in support of the general right.

The reason on which my judgment is grounded is public advantage. The right of bathing in the sea, which is essential to the health of so many persons, is as beneficial to the public as that of fishing, and must have been as well secured to the subjects of this country by the common law. That the right of using the shore for the purpose of fishing does not depend on any particular law applicable to fishing only, but is part of the more general right of the subjects to the sea and its shores, is proved by Lord *Hale*, putting the practice of fishing as evidence of the general right. In part 1. cap. 8. *de jure maris*, p. 11., he says, "The king's right of propriety, or ownership, in the sea, and soil thereof, is evidenced principally in these things that follow; first, the right of fishing in the sea, and the
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creeks and arms thereof, is originally lodged in the crown." This makes the judgment in *Broke* bear directly on the point in dispute. Lord *Hale*, in his treatise *De Portibus Maris* (cap. 6. p. 73.), says, "Before any port is legally settled, although the propriety of the soil of a creek or harbour may belong to a subject or private person, yet the king hath his *jus regium* in that creek or harbour; and there is also a common liberty for any to come thither with boats and vessels, as against all but the king. And, upon this account, though *A.* may have the propriety of a creek or harbour, or navigable river, yet the king may grant there the liberty of a port to *B.*; and so the interest of propriety and the interest of franchise several and divided. And in this no injury is at all done to *A.*; for he hath what he had before, viz. the interest of the soil, and consequently the improvement of the shore, and the liberty of fishing; and as the creek was free for any to pass in it, against all but the king, (for it was *publici juris*, as to that matter, before), so now the king takes off that restraint, and by his licence and charter makes it free for all to come and unload." Here, we have the distinct authority of Lord *Hale*, that although a man has the soil under an arm of the sea, and the soil of the shore, yet the public have not only a right to navigate on the waters, but to *unload* on the shore; and that this right can only be restrained by the king's prerogative. If they have a right to unload, they must have the right to come over the shore; for the right to unload would otherwise be useless. The right on the shore is declared by this passage to be as common to the public as the right on the water: that the water is open to the public for all lawful purposes is not denied.

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What law, then, has narrowed the right of the public on the shore? Lord *Hale* then adds, " But if *A.* has the ripa or bank of the port, the king may not grant liberty to unlade on that bank or ripa without his consent, unless custom hath made the liberty thereof free all, as in many places it is; for that would be a prejudice to the private interest of *A.*, which may not be taken from him without such consent. And, therefore in the creation of a new port, either by proclamation or charter, it hath been the course to secure the interest of the shore beforehand, for the building of wharfs and keys, for the application of the merchandize, and for the building of houses of receipt." Lord *Hale* makes the distinction between the shore of the sea and the banks of a river, which Lord *Kenyon* points at in *Balch v. Herbert*; the former is free for all to come and unload, but the king cannot grant a liberty to unload in the latter, without the consent of the owner. I again repeat, that the shore is not free to unload from any particular law giving this freedom, but from the general right of passage over it, which the usage of the whole coast shews to have been reserved for the benefit of the public out of the grant of the soil by the crown. This is further proved to be the meaning of Lord *Hale* by the concluding words of this passage, in which he says it was usual to secure the interest of the shore, not for a way to the sea, but for the building wharfs, quays, and houses for the reception of goods. The right of way the public had, but the right of building was to be purchased. The cases of *Young v. ———* (a), and *The Queen v. The Inhabitants of Cluworth* (b), are properly

(a) *Id. Raym.* 1761. (b) *9 Mod.* 155.

perly over-ruled by that of *Ball v. Herbert*; and I do not rely on those cases.

My opinion is founded on these grounds. The shore of the sea is admitted to have been at one time the property of the king. From the general nature of this property, it could never be used for exclusive occupation. It was holden by the king, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shews that the public right has been excepted out of the grant of the soil. Our law books furnish us with little for our guidance on this subject; what is to be found seems to favour the common law right of way. But unless I felt myself bound by an authority as strong and clear as an act of parliament, I would hold on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance. In the first ages of all countries, not only the sea and its shores, but all perennial rivers, were left open to public use. In all countries, it has been matter of just complaint, that individuals have encroached on the rights of the people. In *England*, our ancestors put the public rights in rivers under the safeguard of magna charta. The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours. It has been said, that lords of manors should have a right to prevent bathing, that they might hinder persons from doing it in places of public resort. Magistrates are armed

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armed with authority to bring to punishment such a bathers indecently. I would rather rely on disinterested and responsible magistrates, than on an interested and irresponsible lord of a manor. A lord of a manor might remove bathers from a part within view of his own house, but would he be equally active to protect his neighbours from offence? If he is not, I know no mode of forcing him to execute the power he derives from his property. For these reasons, I am of opinion that the defendant is entitled to the judgment of the Court.

HOLROYD J. The question put in this case for our opinion, is the general question, whether there is a common-law right for all the king's subjects to bathe in the sea, and to pass over the sea-shore for that purpose, on foot and with horses and carriages. But, coupled with the facts stated in the case, the question really is, whether there is a common-law right in all the king's subjects to do so in the locus in quo, though the soil of the sea-shore, and an exclusive right of fishing there in a particular manner (namely, with stake nets), are private property belonging to a subject, and though the same have been a special peculiar property from time immemorial. The plaintiff being stated to be the owner of the soil of the shore, and to have the exclusive right of fishing thereon, with stake nets, as lord of the manor, the soil, as parcel of or belonging to the manor, must, according to 2 *Bl. Com.* 92., have been so from before the time of passing the statute, *Quia Emptores Terrarum*, tempore *Edw. 1.*, since which time no manor can have been created; and the plaintiff being stated to have the exclusive right of fishing, as lord of the manor, this can only be as appendant or appurtenant to the manor. It

must,

ers, therefore, be by prescription, and consequently there has been an exclusive right of fishing there from time immemorial. The question, too, is, as to the public right to the extent above stated, independently of usage and custom. The right is claimed on the pleadings, as founded not on usage or custom, but upon the supposed general law only; and the usage, as stated in the special case, is found to have been for the public to cross the sea-shore on foot only, for the purpose of bathing, no bathing machines having ever been used in *Great Crosby*, where the locus in quo is situate, before the establishment of the present hotel. My opinion, therefore, on this case, will not affect any right that has been or can be gained by prescription or custom, either by individuals or by either the permanent or temporary inhabitants of any vill, parish, or district.

The claim upon the pleadings, respecting the public highway along the shore, and the verdict, and facts found in the special case respecting the same, make no difference, but leave the question, with respect to the right of bathing, and the right incident thereto (if any) of passing over the sea-shore for that purpose, on foot and with horses and carriages, the same as if no such claim of a general public highway existed, or was put upon the record, as the jury have found a verdict for the plaintiff upon the new assignment, that the trespasses complained of were committed in the locus in quo on other occasions, and for other purposes than as a general public highway and out of the highway there.

It was contended in argument at the bar, that, by the common law of *England*, all the king's subjects had a right, not only to traverse the ocean itself in every di-

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rection, as well for commerce, trade, and intercourse as for every other lawful purpose; but, also, that the king had a general public right of way over the sea-shore, and from the sea, and that they had it, as well during the recess as during the flux of the tide, for all lawful purposes; and that the king could not grant the shore so as to supersede or to deprive the public of the exercise of that right over the sea-shore. And it was further contended, that even if the public right was not so extensive, yet that, at all events, the king's subjects had a right of bathing on the sea-shore, so that it be exercised in such a way as is conformable to decency; and that they had also, as incident thereto, a right to pass over the sea-shore, not merely on foot, but with horse and carriages; that is to say, with bathing-machines for that purpose, whether the sea-shore belonged to the king as public property, or to any individual as being now or even immemorially private property; and that such public right could not be superseded by the king's grant of the sea-shore as private property. And the earliest authority cited for this purpose was from *Bracton*, who copied it from the civil law. But whatever may be found to be the civil law upon this subject, and whatever may have been stated by some of our law-writers from the civil law, or may be found to have been dropped as dicta from some of our judges; yet it appears, I think, that the civil law, as applicable to this subject, differs from the common law of *England*; that its principles have not only not been adopted into the common law, but are at variance with it, and are therefore no guide to us; that the public right, to the extent claimed in this case, is not only not found to be established by our law, but that the established principles

law are inconsistent with it. The question is regard to the shore; that is to say, the land between high and the low water-mark, and, according to *Hale's* definition of the sea-shore, between those at ordinary tides, that is to say, between the ordinary flux and reflux of the sea.

Bracton, l. 1. c. 12. s. 6., it is thus laid down: publica vero sunt omnia flumina et portus, ideoque jus ad omnibus commune est in portu et in fluminibus. etiam usus publicus est jure gentium, sicut fluminis. Itaque naves ad eas applicare, funes ibi natis religare, onus aliquod in iis reponere, liberum est, sicut per ipsum fluvium navigare; proprietas earum, illorum est, quorum prædiis sunt. Sed hæc intelligenda sunt, de fluminibus; quia temporalia possunt esse pri-

This passage is quite general, and is not confined to navigable rivers. The doctrine as to the right of towing paths, where the river is not navigable, is contrary to the case of *Ball v. Boynton* (a) respecting the right of towing paths, where the river is not navigable, no person doubts, but still it was founded solely on the custom." And the Court determined against the general common law claimed. It is, indeed, supported by the case of *Lord Holt*, in *Young v. —* (b), and *Rex v. —* (c), in the former of which cases he ruled, "that the right of common right, may justify the going of cattle or his horses upon the banks of navigable

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(a) 2 B. 261.

(b) 3 T. R. 261.

(c) 4 Raym. 725. 6 Mod. 163.

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in the arms, or creeks, or havens thereof, the same holds which is before observed, touching acquests the reliction or recess of the sea, or such arms, or creeks thereof. Of common right and primâ facie, it is that they belong to the crown; but where the interest in such districtus maris, or arm of the sea, or creek, or haven, doth, in point of propriety, belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject, will belong to the subject, according to the limits and extents of such propriety."

By the common law, all the king's subjects have a general a right of passage over the sea with their ships, boats, and other vessels, for the purposes of navigation, commerce, trade, and intercourse, and also in navigation of rivers; and they have also, primâ facie, a common right of fishery there; but they may be excluded from the latter right, though not now by charter, at least by immemorial custom or prescription. These rights are noticed by Lord *Hale*; but whatever further rights, if any, they may have in the sea, or in navigable rivers, it is a very different question whether they have, or how far they have, independently of necessity or usage, public right upon the shore, (that is to say, between the high and low water-mark), when it is not sea, or covered with water, and especially when it has from time immemorial been, or has since become private property. For the purpose of the king's subjects getting upon the sea, and upon the navigable rivers, to exercise their unquestionable rights of commerce, intercourse, and fishing, there are not only the ports of the kingdom, established from time to time by the king's prerogative, and called by Lord *Hale* the Ostia Regni, but

also public places for embarking and landing themselves and their goods. It was not by the common law, nor is it by statute, lawful to come with or land or ship customable goods in creeks or havens, or other places out of the ports, unless in cases of danger or necessity, nor to land other goods not customable, where the shore or the land adjoining is private property, unless upon the person's own soil, or with the leave of the owner thereof, who, Lord *Hale* says, may, in such case, take amends for the trespass in unloading upon his ground, though he may not take it as a certain common toll; because, for so doing, it appears in Lord *Hale's* Treatise De Portibus Maris, p. 51., that one *Morgan* was fined 100 marks. No such amends could be taken, if there was a public right of coming there for that purpose in particular, or for purposes in general. In a case of necessity (as Lord *Hale*, in his Treatise De Portibus Maris, p. 53., says) either of stress of weather, assault, or pirates, or want of provisions, any ship might put into any creek or haven. And he then further says, "In case of necessity, and for the supply of fishermen, all places were to that purpose good end ports:" that is, for the purpose of finding provisions for ships and mariners. This is not consistent with the general right contended for, as being in the public, of coming on the shore for their purposes in general as and when they please. It is said, indeed, in *Fitzh. Barre*, 93., which cites 8 *Ed. 4.* 19., "Nota per *Danby* (a), 'That the fishers who fish in the sea may justify their going upon the land adjoining to the sea, because such fishery is for the common wealth, and for

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(a) A Puisne Judge of C. P.

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the sustenance of all the kingdom; wherefore this is the common law, which was granted, &c." But in *B. Abr.*, Customs, 46., the same case is more fully stated, where the doctrine appears to have been laid down upon a question which arose upon a custom. That was trespass for digging land; and the defendant pleaded, that he was four acres adjoining to the sea, and that all the men of *Kent*, from time immemorial, have used, when they have fished in the sea, to dig in the land adjoining a pitch stakes for hanging their nets to dry. *Nele.* (a) He ought to shew what men. *Choke* (b) and *Littleton*, (c) This is not the custom, for it is against common right and reason. *Danby.* (d) Fishers may justify going upon the land to fish, for this is commonwealth, and for the sustenance of man, and is the common law, which was granted. *Fairfax.* (e) "Digging is destruction of the inheritance, therefore it is not a custom, &c." But this appears more fully still by recurring to the Year-books itself, and Lord *Hale*, *De Portibus Maris*, 86., treats it as arising upon a custom; for he there says, "Look at the book of 8 *Ed.* 4. 18. for the Custom of *Kent*, for fishermen to dry their nets upon the land, though it be the soil of private men." The case, as stated in the Year-books, 8 *Ed.* 4. 18, 19., after stating the pleadings as in *Broke*, proceeds as follows: *Nele.* He hath said that the men have used, &c., and this is not a good prescription, being, he ought to shew who, &c. *Choke.* This custom cannot be good; for it is against common right to prescribe to dig in my land; but there

(a) Counsel.

(b) C. J. of C. P.

(c) J. of C. P.

(d) J. of C. P.

(e) Counsel.

the other customs, which are used throughout the whole land, and such customs are lawful; as of innkeepers, &c. and also a neighbour negligently keeping his fire, &c. and such customs are good, &c. *Littleton*. A custom which runs through the whole land is the common law, as the cases that you have put are, &c.; and, Sir, such custom, which may stand with reason, shall not be suffered, as in the case where the younger son ought not to inherit; for there is a reason for this, &c. But this custom is against reason; for if he may dig in one place, he may dig in another place; and so, if a man hath a meadow adjoining the sea, they may, by such custom, destroy all the meadow, which would not be reasonable. *Danby*. Those who are fishers in the sea may justify their going on the land adjoining to the sea; for such fishery is for the commonwealth, and for the sustenance of all the realm, &c.; wherefore this is common law, quod fuit concessum. (This, it may be observed, is as far as it extends to the land above high water-mark, is contrary to *Ball v. Herbert*, unless where it is founded on custom. Such a custom may be good where a right to dig is not claimed, or the doing so may be justified under such circumstances as I shall afterwards state from Lord Hale). *Choke*. If I have land adjoining to the sea, so that the sea ebbs and flows on my land, when it flows, every one may fish in the water which has flowed on my land, for then it is parcel of the sea, and in the sea every one may fish of common right, &c.; and, Sir, when the sea is ebbcd, then in this land, which was flowed before, peradventure he may justify his digging, &c.; for this land is of no great profit to me, &c." It, therefore, clearly appears that this case proceeded entirely upon a particular custom, and the doc-

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to that extent it must be established, in order to en-
the defendant to the judgment of the Court.
then, I ask, where is such a right of bathing on the
shore, where it has become private property, and
immemorially have been so, and of a carriage wa-
that purpose as incident thereto, when sought for, t
found as existing at the common law, independent
usage and custom; a right too which is here claimed
yond the extent of the usage actually found in the ca
Where the soil remains the king's, and where no
chief or injury is likely to arise from the enjoyment
exercise of such a public right, it is not to be suppo
that an unnecessary and injurious restraint upon
subjects would, in that respect, be enforced by the ki
the *parens patriæ*. Where there is, and has hith
been, a necessity, or even urgency, for such a right,
must, or most probably will have, usage and custom
the place to support, regulate, limit, and modify it; t
whenever there has been a necessity for it, there, as
as such necessity has existed, some usage must ha
prevailed.

In *Ball v. Herbert*, (a) Lord Kenyon, in speaki
of common law rights, says, "Common law rig
are either to be found in the opinions of lawye
delivered as axioms, or to be collected from the univer
and immemorial usage throughout the country." A
Ashurst J. says, "It seems extraordinary (if there be a
such right) that it is not defined with greater certai
in any of our law books; for it is a right that in
nature must, if it existed, be subject to some restriction
as, that it should be exercised only on one, and that t

(a) 3 T. R. 261.

of the river ; for it would, in many
 y oppressive right, if it could be
 .” And *Buller J.* says, “This being
 a law right, it can only be proved to
 means mentioned by my Lord, as to
 oughout the kingdom, of which the
 take notice : That clearly does not
 uestion is, whether in our books, or
 right is established for which the

The case in Lord *Raymond* is a
 accurate note. Another authority
Bracton, and quoted by *Callis* : that
 have been taken from *Justinian*, and
 civil law ; and whether or not that
 y the common law, is to be seen by
 oks, and there it is not to be found.”
 to the extent to which it is necessary
 e part of the defendant, is not, there-
 o me, supported either by necessity,
 the realm, which forms the common
 usage in the particular place ; nor is
 r law books ; nor, if it were, would
 s such a common law right as might
 at least, be otherwise appropriated.
 mon law rights are frequently so
 l know to be the fact ; and that this
 ablished, by prescription at least, will
 ility. The public common law rights,
 the sea, &c. independently of usage,
 water, not upon the land, of passage
 e sea, and on the sea shore, when
 r ; and though, as incident thereto,
 ve the means of getting to and upon
 the

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the water for those purposes, yet it will appear that by and from such places only as necessity or use have appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking what they please upon the sea shore, or the land adjoining thereto, except in case of peril or necessity. In *Cartwright v. Murcott*, 4 Burr. 2162., Yates J. (speaking of a prescription for a several fishery, claimed in a navigable river), says, "Such a right may be proved. By the custom of England, what is otherwise common may, by prescription, be appropriated. Grotius owns that navigable rivers may be appropriated. The case of *Royal Salmon Fishery in the River Banne*, in Sir John Davis' Reports, is agreeable to this; and it is a very good case."

Many passages in Lord Hale's Treatises are inconsistent with the existence of such a general right of bathing, and of a passage over the shore with carriages at common law, as is here claimed, and shew that whatever the general public rights are, that they are only such as are upon and in the water, and not upon the dry land, unless in places sanctioned by usage, whether they be parts of the shore or not; at least, that they exist not upon the land, when not covered with water, where it has become private property, and, more especially, where it has immemorially been private or several property. I shall state a few of those passages. It appears from Lord Hale, that the king may license the erecting of quays, or other buildings, on the sea coast, even below the low-water mark, where they are not in fact annoyances or nuisances, Hale, *De Portibus Maris*, 85.; so wears, Hale, 22., *De Jure Maris*. As to the making of ports, and the three-fold right therein, especially

individual subject, by charter or pre-
and previously in a creek or haven,
ing in his own goods, where he is
l. 72, 73. As to the owner's right
it is laid down that the king cannot
r unlade on the ripa or bank, without
there cannot therefore be any com-
e or unlade on the quay or shore,
the port, *Hale*, 51. 76. Evidence
parcel of a manor, &c. disproves the
he king's subjects on the shore, at
e it is not covered with water. So,
t of royal fish and wreck, it is a great
he shore is part of the manor, or
ot have them, *Hale*, 26, 27. Now,
e case, if the king's subjects had a
o come when they pleased upon the
ages from Lord *Hale* appear to me
with the general right contended
of custom, for all the king's subjects
en they please upon the shore, par-
as been either from time immemorial,
e become private or special property,
s not covered with the tide or water.
and establishes the public right of
ing upon and in the water, and the
ne ports, and of lading and unlading,
rking therein, either at the public
r by usage established for those pur-
nsent, upon the land, either of the
als, but no further. This right of
carriage way, as incident thereto, is

no

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no where noticed; and it does not, I think, exist by common law upon the locus in quo, the private property of the plaintiff, unsupported as it is by usage and custom. I am, therefore, of opinion, in this case, that the plaintiff is entitled to the judgment of the Court.

BARRY J. The question in this case is, whether there is a common law right for all the king's subjects to bathe upon the sea-shore, and to pass over it for that purpose, upon foot, and with horses and carriage notwithstanding the part on which the right is claimed is, as to its soil, vested in a particular individual, and although that individual has an exclusive right of fishing in that place with stake nets, and of driving the stakes into the soil, that they may support the nets. And I am of opinion, that there is no such common law right. By the sea-shore, I understand the space between the ordinary high and low water mark, and the property in this is, *prima facie*, in the king. It may indeed, by grant or prescription belong to a subject, but until the contrary is shewn, the presumption is, that it belongs to the king. Many of the king's rights are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation, and of fishing, and it is so in highways, along which all his subjects have the right of passage, and the king can make no modern grants in derogation of those rights. I have mentioned the rights of navigation and of fishing, because I can find no trace of such a right as that now claimed, recognized in any of our books. It is material to distinguish between the different descriptions of rights which

have a right of navigation, which benefit of all the kingdom; and which tends to the sustenance and benefit of individuals; but it does not thence follow also the right of bathing. The extent of the subject's right is to be ascertained in other instances, from the manner in which the shores throughout the kingdom have hitherto been used, and from legal authority. The right, as claimed, is not in any particular place, if it exists at all, but in every part of the sea-shore. Every building, erected upon the sea-shore, and every pier, would be an obstruction to that right, and consequently, abatable or indictable. And in many instances are such buildings, wharfs,

Every embankment by which land is separated from the sea would obstruct the exercise of the right, and be a nuisance, and so would the erecting of drying nets; and yet, how frequently are such erections made, and such stakes set up? It has indeed, been contended for between the public and other erections for public benefit, for the use of trade and commerce, and other purposes; but in how many instances are such erections for private purposes on the sea-shore? It is said that no man is made on the sea-shore without the consent of the crown, and the crown may treat it as a purpresture, and it is abatable; but it has never yet been held to be abatable, because it happens to interfere with the common-law right of bathing. Indeed, I have, as far as I can learn, that such a right has been pleaded upon any pleadings, or contended

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against
CASTLEHALL.

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for in any court of law; and the inconveniences which would result from such a right afford to my mind a strong argument against its existence. In sea-bathing as it now prevails, particular regulations are desirable: the restriction of particular machines to particular spots; a separation of those which are for men from those which are for females; and the prevention of contests as to particular situations. Bathers who desire to use machines should be in places of greater privacy, and at a distance from those parts which are generally used for the recreation of walking; and yet the existence of this common-law right would be a great obstruction to any such regulations. Indeed, if an individual had the grant of the sea-shore from the crown, and were using it for recreation or bathing, his or his family might be interrupted and deprived of privacy by the exercise of this common-law right. It may be observed, too, that the whole shore cannot be necessary for the exercise of this supposed right, and that it may be desirable to apply parts of the sea-shore to other purposes. The king, for the public weal, may suffer such a right to be exercised in those parts of the shore which remain in his hands to any extent, in which the convenience of the public may require; and he may not also allow other rights to be exercised in other parts? If the soil is vested in an individual, how can he be deprived of the right of saying how that soil shall be used, and of the privilege of making any regulations he may think fit? In those places in which convenience has required the right, and it has continued from the time of legal memory, there will be a right by custom; and, where that is not the case, the crown, or the grantees, are not likely to withhold it, upon proper terms.

regulations. The case of *Bagott v.*
 e to conclude nothing on the right
 defendant there justified trespassing
 sands lying within the flowing and
 e, on the ground that every subject
 e liberty and privilege of getting and
 h and shells which had been left there
 general right of the public to take
 admitted in argument; but the right
 on the shore was denied; and it was
 hat the general right was excluded
 as parcel of a manor. The Court
 plaintiff should have replied specially
 question as to excluding the general
 ought the claim as to the shells so
 they offered the defendant leave to
 g his claim to the sea-fish, and that
 t accepted. The claim, therefore,
 y different from the present; it was
 ng serving to the sustenance of man,
 eation only, — a claim to take, when
 what every subject had an undoubted
 whilst they remained in the water; and
 ere was no regular judgment. But it
 follow because all the king's subjects
 k up fish on the shore, that they have,
 pass over the sea-shore for the purpose
 assages cited from Lord *Hale's* treatise,
 22 and 36., in which it is laid down,
 vatum that is acquired to the subject,
 prescription, must not prejudice the

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(a) 2 *Boa. & Pul.* 472.

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jus publicum, wherewith public rivers or arms of sea are affected for public use;" leave the question untouched; because the question in this case is, whether *jus publicum* is: and that they do not define. Lord Hale stated as part of the *jus publicum*, that the public might use the shore as they thought fit; that they might use it as a public highway, or for the purpose of bathing; then those passages would have been authorities applicable to this case. But Lord Hale, in only stating that the *jus publicum* continues to exist without defining what it is. *Bracton*, in l. 1. s. 6., does state what the *jus publicum* is; and if the passage be good law, it is a strong authority in favour of the defendant. The passage is as follows: "Publici sunt omnia flumina et portus. Ideoque *jus publicum* omnibus commune est in portu et in fluminibus." he does not even say navigable rivers; but I will assume that by fluminibus is meant navigable rivers, and as I have cited the passage, I concur in what is laid down; but he goes on: "*Riparum etiam usus publicus est jure gentium sicut ipsius fluminis.*" That the public have the same right to use the bank of the river that they have to use the river itself, and because the water is common to all mankind, the bank is also common to all mankind. The passage then runs on, "*Itaque naves ad eas applicare, funes arboribus natis religare, onus aliquod in iis reponere, cuivis liberum est, sicut per ipsum fluvium navigare.*" The word "*applicare*" here applies to rivers and ports, and probably, also, to land above the high-water mark; and, if it do, is the law of England? have all persons a right to fasten a ship to the banks of a river, or have they a right to tie ropes to trees, or to land goods on the banks of every navigable river?

Ball v. Herbert (a) is not a distinct au-
 nt, inasmuch as in that case, the right
 ed. But the general question as to
 lic on the ripa of a navigable river
 the Court appear to have been of
 a of a navigable river was not pub-
 y therefore virtually overruled the
 on. Lord *Hale*, in his treatise, *De*
 84., after citing this passage, says,
 ts, and the public right of them,
 with this allay, that hath been before
 aw of *England* doth thus far abridge
 y of ports, that no port can be erected
 or charter of the king, or that which
 lies it, viz. custom and prescription.”
 age (b), Lord *Hale* says, “ Though *A.*
 riety of a creek or harbour, or navi-
 e king may grant there the liberty
 u so the interest of propriety, and the
 e, several and divided. And in this,
 done to *A.*, for he hath what he had
 erest of the soil, and consequently the
 e shore, and the liberty of fishing;
 was free for any one to pass in it
 king, (for it was *publici juris* as to
) so now the king takes off that re-
 licence and charter, makes it free for
 lade. But if *A.* hath the *ripa* or bank
 ng may not grant a liberty to unlade
 or *ripa* without his consent, unless
 the liberty thereof free to all, as in
 for that would be a prejudice to the

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private interest of *A.*, which may not be taken from without such consent." There may perhaps be a distinction between the ripa of the river where the soil has been long private property, and that space between the high and low water mark, where the sea ebbs and flows; but if there be such a distinction, what becomes of the authority of *Bracton*, where he says, "*Riparum est usus publicus, est jure gentium sicut ipsius fluminis.*" No man can travel through this kingdom along the banks of rivers, without seeing that private rights, exclusive of public rights, exist there, and every one of those rights is at variance with the doctrine of *Bracton*, and with the supposed common law right now claimed. The practice of bathing may contribute to health, but it ought to be confined within reasonable limits, and is by no means necessary, that the right should be so extensive with the whole shore of the sea, or that it should extend to places where the right of fishing with stake nets exists. In the absence of any authority, to shew that such right exists, and thinking that the authorities cited do not establish it, and that it would be attended with great inconvenience to the public, if a general right, free from all regulation by the owner of the soil was to be exercised throughout the whole of the kingdom, I am of opinion, that no such right exists, and consequently, that there ought to be judgment for the plaintiff.

ABBOTT C. J. I have considered this case with very great attention, from the respect I entertain on this and all other occasions for the opinion of my learned Brother *Best*, though I had no doubt upon the question when it was first presented to me; nor did the defendant's

counsel

doubt in my mind by his learned
 argument. This is an action of trespass,
 the defendant for passing with car-
 riage above high-water mark across
 shore which lies between the high and
 low water for the conveyance of persons to and
 from the purpose of bathing. The plain-
 tiff is the owner of the soil of this part of the
 shore, he has the exclusive right of fishing thereon.
 The defendant does not rely upon any
 prescription for his justification, but
 upon a common law right for all the king's subjects
 to pass over the shore, and to pass over it for that
 purpose, and with horses and carriages; and
 the only matter which, by the terms of the
 writ, is submitted to the opinion of the Court.
 If a common law right existed, there would
 be mention of it in our books; but none
 is to be found, ancient or modern. If the right
 had existed at all times; but we
 find nothing was, until a time comparatively
 recent of no frequent occurrence, and that
 the practice which the practice has been facili-
 tated, are of comparatively modern
 date. There is no authority in favour of the affirmative
 on the terms in which it is proposed, it
 is an argument at the bar on a broader
 ground, the waters of the sea are open to the
 public for all lawful purposes, it has been
 a general proposition, that there must be
 a common right of access to them, for all such
 purposes as like the present. If this could be
 established,

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established, the defendant must undoubtedly prevail because, bathing in the waters of the sea is, generally speaking, a lawful purpose. But, in my opinion, there is no sufficient ground, either in authority or in reason to support this general proposition.

Commerce is a matter greatly favoured in our law, for the reason of the public and national benefits derived from it; but, even as to this favoured matter, I have found no authority in the law of *England* in support of such a proposition. *Bracton*, in the passage so often referred to, speaks not of the waters of the sea generally, but of ports and navigable rivers. It may be admitted, that whatever is true of navigable rivers and their banks may be true of the sea and of its shore. But the case of *Ball v. Herbert* (a) shews that the doctrine of *Bracton* as to the banks of navigable rivers, however warranted by the civil law, is not conformable to the law of *England*. "And as touching ports, and the public right to them," says Lord *Hale*, p. 84., "*Bracton* saith true, but, with this allay, that the law of *England* doth thus far abridge that common liberty of ports, that no port can be erected without the licence or charter of the king, or that which presumes and supposes it, viz. custom and prescription." So that even the privilege to be derived from ports cannot be in its nature universal. And, as to ports, Lord *Hale*, ch. 6. p. 73., distinguishes between the interest of property and the interest of franchise, and says, that "if *A.* hath the ripa or bank of the port, the king cannot grant liberty to unlade on the bank or ripa without his consent, unless custom hath made the liberty thereof free to all, as in many places it is." Now,

(a) 3 T. R. 261.

plied to the natural state of the ripa
holly unnecessary, if every man had
goods on every part of the shore at
d, if there be no general right to
e on the shore, there can be no right
e with carriages or otherwise for the
ng; and, consequently, the general
ch I have alluded cannot be main-
ate conclusion from the general right
er. I have spoken of merchandize,
from the latter I studiously abstain,
n of that kind is before the Court, and
o say any thing upon it. It will be
that I speak only of the general right,
perfectly distinct from those cases of
arise out of the perils of navigation.
n that the general proposition cannot,
maintained, I return to the particular
claimed in the present case.

ics urged at the bar in favour of this
s that of public convenience. Public
ver, is, in all cases, to be viewed with
ivate property, the protection whereof
nguishing characteristics of the law of
ue, that property of the description of
a general, of little value to its owner;
y how that little is to be protected, and
s ever to be increased, if such a general
ed. If there be a general right of
d of this description in the nature of
at law are stake-nets, or other imple-
to be placed there, or sand or stones
y, whereby the exercise of the right
which,

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which, as claimed, will, in its universality, extend its
over every part of the surface, may be obstructed,
rendered less convenient? By what law can any wharf
or quay be made? These, in order to be useful, must
be below the high-water mark, that vessels or boats may
float to them when the tide is in; but when the tide
out, no carriage can pass them. In some parts of the
coast, where the ground is nearly level, the tide ebbs to
a great distance, and leaves dry very considerable tracts
of land. In such situations, thousands of acres have, at
different times, been gained from the sea and its arms,
by embankments, and converted to pasture or tillage.
(But how could such improvements have been made
or how can they be made hereafter, without the destruction
or infringement of this supposed right? And, it is
to be observed, that wharfs, quays, and embankments,
and intakes from the sea, are matters of public as well
as private benefit.

Another topic relied upon by the defendant was
usage and practice. The practice of modern times can
be considered, at the utmost, in the nature only of
evidence, more or less cogent according to its extent and
uniformity. I am not aware of any practice, in this
matter, sufficiently extensive or uniform to be the foundation
of a judicial decision. It was said at the bar
that in some places a compensation is made to the owners
of the shore; but I do not rely on this assertion as
ground of judgment. In many places, doubtless,
nothing is paid. In some parts, the king is the owner
of the shore; and it is not probable that any obstruction
would be interposed on his behalf to such a practice.
Of private owners, some may not have thought it worth
while to advance any claim or opposition; others, may

hav

discretion to put their title to the
of a trial by an unpopular claim to a
e; others, and probably the greater
rived or expected so much benefit
value given to their own land above
houses and the resort of company,
erest may have induced them to
even to encourage the practice, as a
profitable to themselves. But, fur-
as far at least as I am acquainted
degree only, and not in kind or
which prevails as to some inland
as; and even the difference in degree
es, not very great. Many of those
in the vicinity of wastes and com-
on horseback, in all directions, over
alth and recreation; and sometimes,
deviate from the public paths into
may be so traversed with safety. In
of some frequented watering-places,
is to a very great degree; yet no one
any right existed in favour of this
any justification could be pleaded to
t of the owner of the soil.

ing topic adduced for the defendant
t may be considered as confined to
y wherein it can be exercised without
the owner of the shore, and subject
ent use, or future improvement, on his
ce of any public right, so limited and
found. Every public right to be
land of an individual is, pro tanto, a
private rights and enjoyments, both
present

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BLUNDELL
against
CATTERRALL

1821.

BLUNDELL
against
CATHERALL

present and future, so far as they may at any interfere with or obstruct the public right.

But, shall the owner of the soil be allowed to bring action against any person who may drive his car along these parts of the sea shore, whereby no smallest injury is done to the owner? The law provided suitable checks to frivolous and vexatious suits; and, in general, experience shews that the owners of the shore do not trouble themselves or others with such matters. But where one man endeavours to make his own special profit by conveying persons over the soil of another, and claims a public right to do so, as in the present case, it does not seem to me that he has any just reason to complain, if the owner of the soil insists upon participating in the profit, and endeavours to maintain his own private right, and preserve the evidence thereof. For these reasons, I am of opinion that there is not any such common law right as the defendant has claimed.

Judgment for the Plaintiff.

END OF MICHAELMAS TERM.

A S E S

AND DETERMINED

1822.

IN THE

KING's BENCH,

IN

lary Term,

and Third Years of the Reign of
GEORGE IV.

against HORNER. (a)

Thursday,
January 10th.

N in debt, on the statute 5 and 6
, against defendant as an unqualified
on different days in *March*, 1821, a
and destroy game. Plea, nil debet.
Burrough J., at the last assizes for the
was proved by the plaintiff's game-
endant, during the year 1821, had
which he had seen him use in 1819.
that any use had been made of the
committed, the dog was tied up, and never went out into the
was held not to be an offence within the statute.

Following cases were argued at the sittings before

Y

dog

1822.

HAYWARD
against
HORNES.

dog by the defendant during the last season; and contrary, his servant proved, that, subsequently to the shooting season, which commenced in *September*, the dog had generally been tied up, and that he never seen his master take it out into the field after *January*, 1820. It was contended by *Gurney*, for the defendant, on the authority of the case of *R. v. Phelps (a)*, that the mere fact of keeping a spaniel dog was not evidence of keeping it for the purpose of destroying game; and that, in order to constitute an offence within the statute, the dog must be kept for the purpose of killing or destroying game. The Judge was of opinion, that in an action of this kind, it was sufficient to prove the keeping of any of the dogs mentioned in the 22 and 23 *Car. 2. c. 25.*, the 5 *W. & M. c. 25.*, and 5 *Anne, c. 14.*; the legislature having considered such dogs to be dogs for the destruction of game. He therefore directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose having been obtained in last term.

Marryat now shewed cause. The statute enacts that an unqualified person who shall keep or use any hounds, setting-dog, &c., to kill and destroy game, shall be liable to a penalty. The words to kill or destroy game, apply only to the using of the dogs, and not to the mere keeping. Two offences are created, one for keeping, the other for using. The statute does not say that the dogs must be kept for the purpose of destroying the game; but to make a party guilty of the offence

(a) 15 *East*, 271.

must have been used to kill and de-
Beal v. Phelps (a) the dog was so
 not have been used to kill game. In
Ford (b) *Lee C. J.* takes this dis-
 eyhounds, setting-dogs, &c. are ex-
 in this statute, it is not necessary to
 these have been used for killing or
 and the father as they can scarcely be
 purpose than to kill and destroy
 as are not expressly mentioned; and
 pt for the defence of a man's house,
 purposes; it is necessary to allege,
 g comprehended within the meaning
 other engines to kill the game,' that
 used for killing the game."

1822.

HAYWARD
 against
 HORNER.

was stopped by the Court.

I am clearly of opinion, that, in
 an offence within the statute 5 and
 , the dog must be kept or used for
 ng or destroying game. It did not
 that, at the time when the offences
 ed to have been committed, the dog
 purpose. I think, therefore, that the
 , and that the rule for entering a
 de absolute:

m of the same opinion. The words
 toy game;" apply to both the prece-
 or use." It is usual in pleading to

(b) *Sayer*, 15: 1 Wils. 513: 3 C.

1822.

HAYWARD
against
HORNEL.

allege, that the dogs are kept to kill and destroy game. Now such an allegation would be wholly unnecessary. The words kill and destroy game did not apply to the precedent words. Generally speaking, the keeping of a dog of the description mentioned in the act would be *prima facie* evidence that it was kept for that purpose; but, supposing it to be proved, on the other hand, that the dog was tied up during the day and let loose only at night, the jury would fairly be warranted in presuming, that it was kept for the defence of the house, and not for the purpose of destroying game. Indeed, these dogs are frequently kept for the purpose of sale. Now it is perfectly clear, that a person keeping them, is not liable to the penalties of this act of parliament.

HOLROYD J. I am of the same opinion. In the case cited from *Sayer*, Lord Chief Justice *Lee* only said, "That it is not necessary to allege that the species of dogs were used for the purpose of killing game." The case does not apply to the present, where the offence is the keeping of dogs for that purpose. This very point arose in the case of *Briarly v. Athorpe*, which was decided at the *Lent* assizes, 1792, before *Buller J.*, at *York*.

(a) BRIARLY against ATHORPE.

Coram Buller J., Yorkshire Lent Assizes, 1792.

TROVER for a pointer-dog, seized by the defendant, lord of the manor and a justice of the peace, as being in the custody of an unqualified person. *Cockell Serjt.*, for the plaintiff, insisted, that the defendant had no right to seize the dog, either as lord of the manor or as a justice of the peace, a right to seize a dog. First, as not being a setting-dog, nor included within the ac-

... that, in order to bring the case
... was essential that the dog should be
... of killing and destroying game.

1822.

HAYWARD
against
HORNER.

... the same opinion. This is a penal
... therefore, to be construed strictly.
... a dog, of the particular descrip-
... the statute, to kill and destroy the
... distinct offences; and I am of
... the keeping of such a dog does not
... unless it be for the purpose of
... g game. The mere keeping of
... need, be primâ facie evidence of the
... s kept. In this case, however, it

... on, as not being kept for the purpose of
... e-dog, and for defence, plaintiff having used
... he sold his estate, which qualified him, but
... expressly for the purpose of a house-dog.

... estion is, whether a pointer is a setting-dog
... ion, a pointer is within the act of parliament.
... n expounding acts of parliament, to consider
... ria. Stat. 22 and 23 Car. 2. c. 25. s. 3,
... etting-dog, I think, means any dog who *stops*
... ntial that it must be kept or used to kill game.
... would extend to an *Italian* greyhound kept
... t. So "hays." There is no difference that
... a cabbage-net; but keeping a cabbage-net or
... is not unlawful. It must be kept or used to
... to seize. If you (the jury) think the dog was
... ber or October, 1790, being since the plaintiff
... t be a verdict for the defendant, If not, then
... verdict.

Verdict for plaintiff, damages 10*l*.

... z, 496. *Rex v. Gardner, Strange*, 1098. *Rex*

1822.

HAYWARD
against
HORNER,

has been considered as conclusive evidence of purpose. Here there was proof to rebut the *facie* presumption; for it was in evidence, that the dog, during the time in which the offence is laid, the declaration, was generally tied up, and never allowed his master. I think, therefore, that in this there was strong evidence to go to the jury, that the dog was not kept for the purpose of killing and destroying the game, and that the jury would have warranted in coming to that conclusion. That is so, I think that the rule for entering a nonsuit is to be made absolute.

Rule absolute.

DUNK *against* HUNTER.

A landlord has no right to distrain, unless there be an actual demise to the tenant at a fixed rent; and, therefore, where a tenant was in possession, under a memorandum of agreement to let on lease, with a purchasing clause, for 21 years, at the net clear rent of 63*l.*, the tenant to enter any time on or before a particular day: Held, that this only amounted to an agreement for a future lease, and that no lease having been executed, and no rent subsequently paid, the landlord was not entitled to distrain.

REPLEVIN, for taking and distraining plaintiff's goods in his dwelling-house, on the 15th March 1821. A writ that plaintiff, for one year, ending February 11th, 1821, held, as tenant to defendant, at a yearly rent of 63*l.*, payable quarterly, and that defendant distrained for one year's rent in arrear. Plea, that he was not tenant, secondly, that the rent was not in arrear. The cause was tried before Burrough J. at the last Summer assizes for Sussex, when it appeared, on the 19th March, 1819, the following agreement entered into between the parties. "Memorandum

between Mrs. *Ann Hunter*, of *Southwick*,
Dunk, of *Brighton*, butcher. Mrs. *Ann*
 to let on lease, with purchasing clause,
 of 21 years, all that house and premises,
 et, present tenant *Thomas Lawler*; enter-
 id premises by *D. Dunk*, any time on or
 a day of *February*, 1820, at the net clear
 year, and to keep all premises in as good
 taken to (reasonable wear allowed), pay-
 50*l.* in ready cash, and the rent payable
 the term for 7, 14, or 21 years, which
Dunk is to give one clear year's notice, be-
 tion of either of the above term of years,
 o leave; if purchases before the expiration
 term by *D. Dunk*, he is to pay on purchase
 (a) The plaintiff, under this agreement,
 of 50*l.* on the 10th *February*, 1820; but
 , as it was said, of some arrangement be-
 the former tenant, he did not enter into
 of the premises till the 10th *April* follow-
March preceding, an application was made,
 dered to the defendant to execute, but she
 so, saying she had found that she could

No rent had been paid by the plaintiff.
 d a verdict for the defendant. *Marryat*,
mas term, obtained a rule nisi for entering
 the plaintiff, on the ground that the above
 not amount to a lease; and that, unless
 eld under a demise, at a specific rent, the
 no right to distrain for rent-arrear. And

1822.

 DUNK
 against
 HUNTER.

y of the original memorandum, except that the spelling

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against
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Gurney and Courtthope shewed cause. In this case the plaintiff was tenant to the defendant, for the agreement amounted to a lease. Here the defendant agreed to let at a specified rent, and the plaintiff has paid 50*l.*, and entered into possession under the agreement. He cannot, therefore, now say, that he did not hold that rent. Then, the rent being due, the distress is legal. *Tempest v. Rawling. (a)*

Marryat and Chitty, contra. There must be a demise at a specific rent, in order to entitle a landlord to distrain. He cannot distrain for a quantum meruit. The only remedy in such a case is, by an action for use and occupation. Then if so, the question is, whether there is an agreement for a lease, or a lease; and clearly it is the former only. Here it specifies, that the defendant agrees to let on lease with a purchasing clause; and shews a future lease must have been contemplated. The rent, too, must mainly depend, for its amount, on the beneficial clauses which were to be introduced into the future lease. *Hegan v. Johnson (b)* is not distinguishable from the present case. As to *Tempest v. Rawling* there is this distinction, that in that case there had been a payment of rent; which there has not been here.

ABBOTT C. J. On looking through the whole of the instrument, which has obviously been framed by an unlettered person, it appears to me, that this is only an agreement preparatory to a demise, and not an actual demise. If it had been the latter, then the defence

(a) 15 East, 18.

(b) 2 Taunton, 148.

titled to distrain for the rent. But it
 is not so. It has not any one of the
 begins thus, "Memorandum of an
anne Hunter agrees to let on lease"
 (ans to execute a lease) "with a pur-
 the term of 21 years, the tenant to
 es at any time on or before the 11th
 " Now, looking at this instrument,
 a the tenancy was to commence or
 due. The whole is left in doubt,
 hat this was intended as a mere me-
 agreement to grant a future lease.
 is, whether the allegation in the
 by the proof. A party has no right
 ere be a fixed rent agreed upon; if
 w gives him a remedy by the action
 ion. There can be no distress, un-
 act for an actual demise at a specific
 language of the instrument is such,
 id contract until something further
 uments have, in some cases, after an
 der them, been held to amount to
 But here, it does not amount to a
 rent, and therefore the defendant
 o distrain, and cannot sustain the
 owry. The rule must therefore be

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DUNK
 against
 HUNTER.

allegation in the avowry is, that
 e premises as tenant thereof to the
 e of a demise thereof to him the
 made. The first question is, whe-
 dum of an agreement amounts to a
 demise

1898,

DUNE
against
HUNTER.

demise for 21 years. If it does, then the allegation the avowry is made out in evidence. In the case *Morgan v. Bissell* (a), the rule is laid down thus, although there are words of present demise, yet if collect on the face of the instrument, the intent of parties to give a future lease, it shall be considered agreement only. It is clear in this case, that the merum et valde of agreement was not intended to operate present demise. We cannot ascertain from the language of the instrument, when the term was to commence. There are no words of demise, nor any words from which a warranty of title may be implied, would be the case if the word "grant" had been inserted. The meaning of the parties seems to have been that if the defendant entered before the 11th February the term was to commence from the period of his entry. Upon the whole, therefore, it seems to me, that the parties contemplated the execution of a future lease. Then, if this was not an actual demise for 21 years, the party did not at all events hold at the annual rent of 63%, and if so, the plaintiff by law could not distrain the rent not being fixed. If a person bargains for a lease for 21 years, the rent is estimated upon an average for the whole term, and it may be of no benefit to the party whatever for the first year of his occupation. Here, the rent of 63% is estimated on the terms of there being a lease granted, and at the time when the distress was made, no lease was granted, and no payment of rent had taken place. I think, therefore, that the plaintiff could not hold the premises at any specific rent, and that the defendant's only remedy was by an action for use and

(a) 5 Taunt. 65.

the amount of the rent would be a
to the jury. This rule, therefore,
ate.

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DUNK
against
HUNTER.

of opinion that the defendant was
rain. This did not operate as a
was a mere agreement to let in
different instrument. And there is
at it was the intention of the de-
n the premises until that instrument
s clear, that an agreement to grant
ount to a letting. Besides, in this
quent words relative to the intro-
for purchasing, which shew, that the
y a particular instrument containing
l in addition to this, the stipulation
of 50*l.* upon entry, is quite incon-
ng an actual demise. For if it were
e tenant would have had a right to
without paying that sum. I think,
defendant was not entitled to distrain,
ust be made absolute.

ed.

Rule absolute.

1822.

WEST *against* ANDREWS.

I. S. being the master of the workhouse, appointed by, and receiving orders from, the guardians of the poor of the parish of *W.* bought provisions from *A.* *B.* one of such guardians: Held, that *A.* *B.* was liable to the penalty of 100*l.* imposed by the 55 G. 3. c. 137. s. 6.

DEBT on 55 G. 3. c. 137. s. 6. for a penalty of 100*l.* Declaration stated, that defendant, on 1st *June* 1820, was overseer of the poor of *Westhamperett, Sussex*, and during the time he was overseer, furnished and supplied in his own name, goods and provisions for the support of the poor. The second count described him as a person in whose hands the collection of rates was. Plea general issue. At the trial before *Brough J.*, at the last assizes for the county of *Sussex* it appeared that defendant was one of the guardians of the poor for the parish, and that the poor-house there was under their controul, being managed by one *Griffith* who was the master of the poor-house appointed by the guardians, and receiving his orders from them. *Griffith* provided for the poor, having a contract at so much per head, and found all the meat, &c. In the year 1820, he bought of the defendant, then being supervisor of the poor, four live sheep for the use of the poor, and paid him for them. The learned Judge thought this not a case within the act, and directed a non-suit. *Gurney* having in last *Michaelmas* term obtained a rule nisi for a new trial.

Marryat shewed cause. Here, the defendant did not supply the sheep to the parish, and had therefore no claim on the parish. His claim was solely on *Griffith* who had a standing contract with the parish, and full liberty to buy from whom he pleased. The object of

prevent overseers from availing themselves, to force their goods on the
or v. Manwaring (a), and *Pope v.*
 articles were supplied to the in-
 relief. Here, that was not the case.
 was made of the provisions supplied,
 not to the defendant alone, but to the
 rdians.

rewhether, *contra*. The case falls with-
 mischief intended to be remedied by
 be allowed, one guardian may supply
 ar, &c.; and then, although complaint
 the general body, yet they would be
 o do justice.

I am of opinion, that this is a case
 parliament. Here the defendant has
 r the supply of provisions with a third
 he contract for providing for the poor,
 defendant, in conjunction with others,
 situation, and whose conduct it is his
 end. Under these circumstances, it
 at all the mischief which was con-
 legislature would arise, if we were to
 s lawful. I am therefore clearly of
 defendant's case falls both within the
 of the act of parliament, and that the
 al must therefore be made absolute.

Rule absolute.

1822.

WEST
 against
 ANDREWS.

1822.

GURNEY and Others *against* LANGLANDS

An issue having been directed to satisfy the court as to the forgery of a signature to a warrant of attorney, a verdict was found, establishing the genuineness of it, upon evidence satisfactory to the judge who tried the cause, and to the court upon his report of it. In the course of the trial, an inspector of franks, who had never seen the party write, was called to prove, from his knowledge of hand writing in general, that the signature in question was not genuine, but an imitation; this evidence having been rejected, the court refused to disturb the verdict, on the ground that such evidence, even if admissible, was entitled to very little weight, and that the issue being to satisfy the court, a new trial ought not to be granted, unless for the rejection of evidence which might reasonably have altered the verdict. *Quære*, if such evidence be admissible at all.

FEIGNED issue directed by the Court of King's Bench, to try whether the supposed signature of *Thomas Gurney* the plaintiff, to a certain warrant of attorney, dated 16th *April*, 1821, was forged. A trial before *Wood B.*, at the last assizes for *Surrey*. The plaintiff, in support of the affirmative of the issue, tendered the evidence of *Joseph Hume*, inspector of franks at the post-office, who stated, that he was acquainted with the plaintiff's hand-writing, and then asked the following question: "From your knowledge of hand-writing, do you believe the hand-writing in question to be a genuine signature, or an imitation?" This question was objected to, and the objection allowed by the learned Judge, who stated in his report the following reasons: "When a witness has seen another write, or has, by receiving notes or letters from him, become acquainted with his hand-writing, he has no ground of forming a belief as to it. But where, as in this case, he acknowledges that he had not any previous acquaintance whatever with the hand-writing of the plaintiff, he could not, as I conceived, have any foundation for his opinion or belief, whether the signature in question was genuine or only an imitation; he had never seen or had any knowledge of that which it was supposed to be an imitation. There is no general known standard by which hand-writing

only be determined to be counter-
 e previous knowledge of the genuine
 and-writings of men being as various
 inions of skilful engineers and marl-
 iven in evidence in matters depending
 to what effect an embankment in a
 n may have upon a harbour, or
 s been navigated skillfully. Because,
 witness has a knowledge of the alleged
 l enables him to judge and form a
 et. I had never known such loose
 dmitted, or even offered, and it struck
 ission of it would produce much mis-
 endanger written securities." The
 art of the defendant of the subscribing
 arrant of attorney and others, was so
 ury declared themselves satisfied, and
 for the defendant. *Knowlts*, in last
 obtained a rule nisi for a new trial, on
 his evidence was admissible, and had
 and now,

Gurney shewed cause, and suggested
 n issue to satisfy the conscience of the
 l ought not to be granted, unless evi-
 t nature had been rejected. And they
 whether this was admissible or not,
 events, it could not have produced any
 verdict.

Chitty, contra. *Goodtitle dem. Revett v.*
Rex v. Gator (b), establish the admis-

497. (b) 4 *Rep.* 117.
 sibility

1822.

GURNEY
 against
 LANGLANDS.

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against
LANGLANDS.

sibility of the evidence. In *Birch v. Crewe*, *London* sitting after *Trinity* term, 1821, the same evidence here offered was received by *Abbott C. J.* It is impossible to say what effect it might have produced on the jury, because if not overruled, it would have been followed up by the evidence of many other skilful persons to the same effect. And when evidence has been wholly excluded, the Court will not weigh very nicely what effect it might have had if received.

ABBOTT C. J. I have long been of opinion, that evidence of this description, whether in strictness of law receivable or not, ought, if received, to have no great weight given to it. This was an issue directed by the Court, in order to enable them to come to a satisfactory conclusion upon a rule pending before them. The other evidence in this case was of so cogent a description as to have produced a verdict satisfactory to the Judge who tried the cause; and I can pronounce my judgment much more to my own satisfaction upon the verdict so found, than if this evidence had been admitted, and had produced a contrary verdict. For I think it much too loose to be the foundation of a judicial decision, either by judges or juries. The rule, therefore, for a new trial must be discharged.

BAYLEY J. concurred.

HOLROYD J. I have great doubt whether this is legal evidence; but I am perfectly clear that it is not received, entitled to no weight; and this being an issue directed to satisfy the Court, we shall best exercise our discretion by refusing a new trial.

*B.

can be no doubt that this is not, in natural hand-writing of the party; at the time he wrote it he had the deed, he would not sign it in the evidence, therefore, if received, no weight. It is impossible for any hand-writing being an imitation, the original; and it does not appear follow, that an inspector of franks of ascertaining imitated hand- at all events, this evidence was sufficient ground not having been receiving it. But still, even if it is satisfied that, on the ground Chief Justice, this rule ought to be

1822.

GURNEY
against
LANGLANDS.

Rule discharged.

HER against SIMMONS.

*Questioned in
Bird vs Boulton
4 B + Ad. 443-*

the plaintiff, an auctioneer, against not taking or clearing away or pay- money, being 34l., for a lot of turnips, in certain land. Second count, for gained and sold, &c., and the usual, general issue. At the trial before assizes for the county of Surry, the whether there was a sufficient con-

The agent contemplated by the 17th sect. of the statute of frauds, who is to bind a defendant by his signature, must be a third person, and not the other contracting party; and therefore, where an auctioneer wrote down the defendant's

note to the lot purchased: Held, that in an action brought in the entry in such book was not sufficient to take the case out

Z

tract

1822.

FAIRBROTHER
against
SALMONS.

tract in writing to satisfy the statute of frauds. appeared that the contract given in evidence was that in which the plaintiff himself had written down different biddings opposite to the lots, and which had been duly stamped. The learned Judge delivered a verdict for the plaintiff, reserving to the defendant liberty to move to enter a nonsuit. *Marriot*, Michaelmas term, obtained a rule nisi for that purpose and cited *Wright v. Dannah* (a).

Gurney and *Abraham* now shewed cause. They had no interest in land; for the turnips having ceased to grow, the land merely was a warehouse for them. even if this be not so, the book is sufficient to take the case out of the statute. For the plaintiff may be considered as the agent of both himself and the defendant for the purpose of reducing the contract into writing. The case of *Wright v. Dannah* is distinguishable. In that case the party who wrote the memorandum was the defendant who made the sale for his own benefit. Here it was the case of an auctioneer, who has no personal interest in the transaction.

ABBOTT C. J. The most favourable way for the plaintiff is to treat the question as a case of goods sold and delivered; and then, the goods being above the value of 10*l.*, the case will fall within the 17th section of the statute of frauds, which requires some note or memorandum in writing of the bargain, to be made and signed by the parties to be charged by it, or their agents, the lawfully authorised. Now, the question is, whether

(a) 2 Camp. 203.

endant's name by the plaintiff, with
defendant, be in law a signing by the
general, an auctioneer may be con-
and witness of both parties. But
in this case, from the auctioneer
contracting parties. The case of
ems to me to be in point, and for-
at which I have arrived, viz. that
ated by the legislature, who is to
his signature, must be some third
other contracting party upon the

1822.

FAREBROTHER
against
SIMMONS.

Rule absolute.

Another *against* BIGNOLD.

plaintiffs, who were printers, to
of 92l, 5s. for printing a pamph-
Elucidation of the System of Fire

Part of the charge was for print-
er. At the trial before *Abbott C. J.*,
ings after last *Hilary* term, the

ed, and it purported to be printed
nder, 267, *Strand*, and not by the
ected, on the part of the defend-
ffs could not recover, the 39 G. 3.

enacted, "That every person who
r or book whatsoever, which shall
led to be published or dispersed,
hall be sold or given away, shall
of every such paper, if the same

Z 2

shall

A printer can-
not recover for
labour or ma-
terials used in
printing any
work, unless he
affixes his name
to it, pursuant
to the 39 G. 3.
c. 79. s. 27.

90221
10342
1 M24
119
1 Di.1.
2 M293

1822.

—
 BENSLEY
 against
 BIGNOLD.

shall be printed on one side only, and upon and last leaves of every paper or book which consist of more than one leaf, in legible character her name, and the name of the city, town, place, and also the name (if any) of the square, lane, court, or place in which his or her dwelling or usual place of abode shall be; and every person shall omit so to print his name and place of abode on every such paper or book printed by him, or by every person who shall publish or disperse, or cause to be published or dispersed, either gratis or for money, any printed paper or book, which shall have been printed after the expiration of forty days from the passing of this act, and on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall, for every copy of such paper or book published or dispersed by him, forfeit and pay to the plaintiff 20*l*." It was contended, that the statute being retrospective, the printer must print his name, &c., and the case must be governed by the same principles which had been applied to other prohibitory statutes, as in *Ribbans v. Crickett* (a), *Lightfoot v. Tenant* (b), *Hodgson* (c), and *Langton v. Hughes* (d), &c. The Lord Chief Justice directed the jury to find for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose having been obtained in last *Easter* term,

Scarlett and *F. Pollock* now shewed cause for the omission to insert the name of the printer on the

(a) 1 *Bos. & Pul.* 264.(c) 2 *Campb.* 147. 11 *East*, 3.(b) 1 *Bos. & Pul.* 551.(d) 1 *Maule & Selw.* 593.

not constitute such a breach of the
 t the plaintiffs recovering in this
 established rule, that where an act
 , by prohibiting what was lawful be-
 fic remedy against such new offence,
 pursued. But if it be an offence
 indictment is also maintainable.
 And where newly-created offences
 by the general prohibitory clause of
 an indictment will lie; but where
 prohibitory clause, specifying only
 those remedies must be pursued.
 The omission to insert the name
 not an offence at common law. It
 statute which contains no general
 ut a particular clause, which is not
 g a particular remedy. It is not,
 ble offence; and, if not, it is not
 w as to operate as a bar to a de-
 . It is true that, in *Marchant v.*
 of Common Pleas decided that an
 naintained by a printer for printing
 eekly periodical work, printed on
 distributed as newspapers, unless
 his name at the stamp-office in an
 name and place of abode printed
 e publication, as required by the
 In that statute, however, there was
 y clause, without any specific pe-
 te clause with a penalty annexed.
 e is no prohibitory clause whatever,

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 against
 BIGNOLD.

(b) 1 Burr. 544.

(c) 2 B. Moore, 14.

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against
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but merely a particular regulating clause, protect a specific penalty. That case, therefore, confirms a distinction which has been laid down in many former cases, between a prohibition and a penal enactment. The cases cited at the trial are inapplicable to the present case. *Law v. Hodgson* was decided on the ground of fraud. The other three cases cited were cases of actual prohibition. In *Sullivan v. Greaves* (a), *Gallini v. Laborie* (b), *Law v. Lashley* (c), *Brown v. Turner* (d), *Camden v. Ash* (e), *Mitchell v. Cockburn* (f), *Booth v. Hodgson* (g), *Aubert v. Maze* (h), *Buck v. Buck* (i), *Lofthouse v. Panton* (k), *Parkin v. Dick* (l), *Webb v. Brook* (m), *Chant v. Evans* (n), and *Cannan v. Bryce*, either an indictment might have been supported at common law, or the statute in each particular case contained dispositive words of prohibition, or such as rendered the contract null and void ab initio. The cases of *Tenant v. Liott* (o), *Farmer v. Russell* (p), *Robinson v. Bland* (q), *Falkney v. Reynous* (r), and *Petrie v. Hannay* (s), are authorities to shew that a defendant is not allowed on all occasions to avail himself of illegality as a protection against a just demand, even in transactions in contravention of the policy of particular statutes. In *Greaves v. Le Clerc Bois Valon* (t), it was held, that a person not licensed as a surgeon, according to the 3 Hen. 6. c. 11., may recover for business done on a quack

(a) *Park on Insurance*, 8.

(b) 5 T. R. 242.

(c) 6 T. R. 61.

(d) 7 T. R. 630.

(e) 1 Bos. & Pul. 272.

(f) 2 H. Bl. 379.

(g) 6 T. R. 405.

(h) 2 Bos. & Pul. 371.

(i) 1 Campb. 550.

(k) 2 Campb. 221.

(l) 3 Taunt. 6.

(m) 2 B. Moore, 14.

(n) 3 Barn. & A. 179.

(o) 1 Bos. & Pul. 3.

(p) 1 Bos. & Pul. 296.

(q) 2 Burr. 1077.

(r) 4 Burr. 2069.

(s) 5 T. R. 419.

(t) 2 Campb. 144.

not being prohibitory, but merely of the act are, "no person shall to exercise physic or surgery, &c. er penalty of 5*l.* per month." In (a), it was held, that a person selling aler, who is also a distiller, which prohibited by the 26 G. 3. c. 73. s. 54. gh he knew that the spirits were to lery; and in *Johnson v. Hudson* (b), unlicensed dealer in tobacco might on for tobacco sold and delivered, statute 29 Geo. 3. c. 68. s. 70. which rson who shall deal in tobacco shall, therein, take out a license, and by to be renewed yearly, under a pe- ground of the decision in that case as no clause whatever making the t that, at most, it was a mere breach ulation, which was protected by a he three cases last cited are strong. r of the plaintiffs' right to recover des, in this case, a great part of the arises in respect of the paper pro- printing, and for that, at all events, recover.

was stopped by the Court.

am of opinion, that the rule for t must be made absolute. Where particular thing to be done, it must there be an omission to do the s not any excuse that the party did

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against
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81. (b) 11 East, 180.

THE RULE IN QUESTION IS THAT. This is a rule governing the manner in which the proceedings in cases arising out of the exercise of the power of taxation, by which particular persons are assessed to the land or personalty. The object of the act is to ascertain, in the manner of every jurisdiction is; and 2dly, the manner in which the same shall be assessed. The 27 sec. of that act provides that every person who shall print any petition, shall print upon the first and last leaves of the petition the name of his or her name, (not the name of the petitioner, and the name of his or her place of residence. The statute therefore contains a positive provision, that the name shall be so printed. Here, the petition has been printed, and the omission to print the name is a direct violation of the statute. And I am of opinion that a writ cannot be permitted to sue either for the recovery of the petition or for materials provided, when the petition contains the entire subject matter, in direct violation of the provisions of an act of the legislature. The rule for entering a nonsuit must therefore be made absolute.

BATLEY J. The 39 G. 3. c. 79, establishes regulations for public purposes. It requires that certain acts shall be done, and makes it penal for any person to neglect to do those acts. The omission of them is a direct violation of the law: and a person cannot be permitted, in a court of law, to recover his work and labour done in direct violation of the law. Where a provision is enacted for public purposes, I think that it makes no difference whether the act is prohibited absolutely or only under a penalty. The public have an interest that the thing shall not be done.

objection in this case must prevail, not
the defendant, but for that of the public.

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against
RIGOLD.

The principle applicable to the present
established by many decided authorities.
appear to me to be any sound distinction
where a statute requires a thing to be
it prohibits it from being done. Here
the printer's name to appear on the
effect the same, as if it prohibited
any work without affixing his name
however, that there is a distinction
cases where a thing is prohibited gene-
it is prohibited only under a penalty,
not merely prohibited under a penalty,
expressly requires, that the printer's
printed, which is the same thing as if it
prohibited him from printing a work
The rule therefore must be absolute.

distinction between mala prohibita and
been long since exploded. It was not
any sound principle, for it is equally un-
should be allowed to take advantage of
says he ought not to do, whether the
ed, because it is against good morals, or
prohibited, because it is against the in-
The object of the 39 G. 3. was to
most effectual means of discovering the
publication, in order that they might
able for the contents, and for that pur-
posed, that all the parties concerned in
publication into the world, whether printers

or

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or publishers, shall be made known. Here, the printer's name has not been printed upon, the publication required by the act of parliament, and that being there is no legal contract on which an action can be founded, inasmuch as the thing was done in direct violation of the law. The case of *Marchant v. Egan* is precisely in point. I am of opinion, therefore, that the pamphlet having been sent out without the name of the printer, he cannot recover for the labour, or for the materials used in printing it. The rule must therefore be made absolute.

Rule absolute.

SLEAT and Others against Fagg.

A parcel containing country banker's notes, of the value of 1300*l.* and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail coach, and was accepted by him to be so carried.

The parcel was sent by a different coach, and was lost. The carriers had previously given notice

that they would not be answerable for any parcel above 5*l.* in value, if lost or damaged, unless an insurance were paid. No insurance having been paid in this case, Held, notwithstanding that the carrier was responsible for the loss.

DECLARATION stated, that, in consideration of the plaintiffs, at the request of the defendant, he caused to be delivered to the defendant a parcel, containing promissory notes for payment of money, country bank notes, and other notes, of the value of 3000*l.*, and certain promissory notes by the plaintiffs, for the payment of money on demand to the bearer thereof, to be forwarded by defendant for plaintiffs, towards *Christchurch*, in the county of *Hants*, for a certain reward. The defendant in that behalf, defendant undertook to forward such parcel towards *Christchurch*, by a certain coach called *The Pool Mail*. Breach, that defendant did not forward the parcel by the *Pool* mail, but, on the contrary,

trial

parcel to be sent by a certain other
the parcel and contents were lost to
on-assumpsit. At the trial, before
the *London* sittings after last *Hilary*
appeared to be the facts of the case.
bankers, resident at *Christchurch*, in
ts, and issued promissory notes, pay-
s' in *London*, Messrs. *Rogers, Towgood*
er, for a considerable time, had been
nding, on the first of every month, a
a large quantity of notes, paid by
f the plaintiffs during the preceding
to Mr. *Angier, Christchurch, Hants*,
head clerk in the plaintiffs' banking
rcels were sent to the office of the de-
l and *Crown, Holborn*, for the purpose
d by them to *Christchurch* by the *Pool*
t insured as parcels of value. On the
0, *Rogers, Towgood* and Co, delivered
he defendants in *Holborn*, a brown
ntaining notes of the plaintiff to the

It was addressed to "*R. Angier,*
nts, per mail," and the defendant's
ked it to go by the mail. It was in
thampton light coach, which went from
t half past four in the evening. It
at the office to send all parcels ad-
hurch, which arrived at the office before
light coach, and the defendants had
l preceding months, the parcels which
ed to Mr. *Angier*, and which had been
by the mail. The *Southampton* light
in *Holborn* at half past four; it stop-
ped

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ped for supper and other purposes on the road ; and at *Southampton* the parcels are taken out to be ready when the mail arrives. The mail leaves the *Bell and Crown* in *Holborn* at half past seven in the evening, and arrives at *Southampton* about twenty minutes after midnight in a light coach, and then any parcels coming by the day coach, addressed to *Christchurch*, are put into the night coach and forwarded to *Ringwood*, where such parcels are then put into a mail-cart, and conveyed to *Christchurch*. Neither of these coaches went the whole way from *London* to *Christchurch*. The price of the carriage of such parcels was the same by both coaches. It appeared that the defendant had given notice that he would not be answerable for any article exceeding 5*l.* value if lost, stolen, or damaged, unless the article were insured, and the plaintiffs were cognizant of that notice. When an article was insured as a parcel of value, it was the practice in the defendant's office to place it while the coach was in an iron chest, and upon loading the coach, to place it in the boot of the coach, with the heavy luggage of the coach, so as that it could not be taken out without removing the superincumbent articles. The parcel in question, not having been insured as a parcel of value, was placed under the seat in the inside of the coach, and was lost. The defendant's book-keeper stated that he had always supposed the parcels sent to the plaintiffs to contain some monthly publication. On that day on which the parcel in question was lost, a person who booked himself for the evening, in the name of *Jones*, for *Southampton*, as an inside passenger, and who was present when the coach was loading, and heard the names of the persons to whom the different parcels were addressed called over, went by the coach as far as *Farnham*, saying that he meant to sleep there, but, upon enquiry, no information

wards be obtained there respecting him, very little doubt that he was the person who delivered the parcel. On the following morning, parcels, to the amount of 1050*l.*, were presented at Messrs. *Rogers, Towgood* and *Co.* The defendant, *W. G. Rogers* and the proprietors of the *Pool* mail; the other different persons were the proprietors of the *Southampton* light coach. Upon these facts the Chief Justice was of opinion, that if a mail-coach travelling the whole way from *Christchurch*, the plaintiffs would have recovered; but the fact being otherwise, he directed the jury to consider whether the risk was increased by sending the parcel by the light-coach mail; telling them, if they were of opinion that the risk of loss was increased by sending the parcel by the substituted mode of conveyance, they were to give their verdict for the plaintiffs. A verdict was given for the plaintiffs for 1050*l.* A rule was made in last *Michaelmas* term for the defendant to shew ground that the carrier was in this bound by the terms of his notice, the parcel was not insured.

At, and F. Pollock, now shewed cause. The defendant was not protected by his notice; for the loss was not of negligence in the course of the performance, but of non-performance of the contract. The defendant contracted to send by one coach, but the parcels were sent by another. If a purchaser of goods from a vendor to send them by a particular coach, and they are lost, the

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the vendor would clearly be responsible. Here the jury have found that the risk was increased by defendant having sent the parcel by the light coach instead of the mail. The want of notice to the carrier of the value of the parcel, might possibly have been an answer to this action, if the parcel had been sent by *Pool* mail, and lost in the course of conveyance.

Littledale and *Parke*, contra. No notice having been given to the defendant of the value of the parcel, he is discharged from liability by the stipulation in the notice, that he will not be answerable for any goods above a certain value unless insured. In *Batson v. Donovan* (a), it was held, that any unfair concealment of the value of the parcel by the party sending it discharges the carrier, and *Bayley* J. there says, "the holding out as an ordinary risk, what is really an extraordinary one, is a legal fraud." In this case, the notes were inclosed in a brown paper parcel, and addressed to a clerk of the plaintiffs, for the very purpose of concealing the nature of the contents from third persons, but the defendant was thereby also deceived and was induced to consider it as a parcel of no value and to place it in a part of the coach where parcels of little value are usually placed. It is true, that the defendant undertook to carry this parcel by the *Pool* mail, but that special undertaking cannot vary the consequences of any breach of the contract. The defendant enters into the contract to carry by a particular conveyance, on the condition only, that the party shall deal fairly, and not commit any fraud. In *Batson v. Donovan*

(a) 4 B. & A. 21.

mission on the part of the plaintiff,
notice of the value of the parcel; here
nal circumstance, the parcel is ad-
of the plaintiffs, for the very purpose
nature of its contents, and that was a
defendant, and nullified the contract.
lan (a), the defendants, who were pro-
and heavy coach, contracted to send
l; it was booked for the heavy coach,
They were held not to be liable for

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I am of opinion, that there is no
ing this verdict. I cannot say that
ation of the contents of the parcel to
be directing of it to a clerk of the
urpose of concealing its contents, was
the carrier as to make his contract
has been held, indeed, that a plain-
owed to complain of a negligent per-
contract by the carrier, where that neg-
occasioned by the plaintiff's own act,
the parcel as a thing of no value.
not the case of the negligent perform-
ct, but of a refusal altogether to per-
endant did not send the parcel by the
ad contracted to do. This forms a
a between this case and that of *Batson*
des, in this case, the jury have ex-
at by the substituted mode of con-
erty was exposed to greater risk than
e, had it been sent by the mode elected

(a) 5 East, 507.

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by the plaintiffs. For these reasons, I think that rule for a new trial must be discharged.

BAYLEY J. In *Batson v. Donovan*, the very ground of action against the carriers was a negligent performance of their duty, and it was held, that plaintiff in that case could not make that negligent ground of action, because he had superinduced his own neglect, in not communicating the value of the parcel to the defendants. If that had been done, it would probably have placed it in a more secure position in the coach. In that case, the carriers in performing their contract placed the parcel in the coach, and the foundation of the charge against them was mere negligence in the course of performing their contract. This is a case not merely of negligence, but of misfeasance. The defendant received the parcel for the purpose of conveying it by the *Pool Mail*, of which he was a proprietor. He, however, divests himself of the charge, and sends it by another conveyance, of which all the same persons were not proprietors. The defendant, therefore, did not carry it in pursuance of his contract, but substituted a different carrier, and that being so, this case is governed by the decision of the Court in *Garnett v. Willan*. (a) If the defendant had sent the parcel by the mail in pursuance of his contract, I should have been of opinion, that under the circumstances of the case, he would not have been liable for the loss. But having sent it by a different mode of conveyance, I am of opinion that he is liable, and consequently, that this rule must be discharged.

(a) *Ante*, 53.

am also of opinion, that in this case
to be a new trial. The question is,
is protected from the loss in ques-
of his notice. I think, that in cases
carrier is not thereby exempted from
ly a case of misfeasance. It is not
e course of performing the contract,
usal by the defendant to execute the
into by him; for here he contracted
veyance, the proprietors of which
le in case of loss, and he sends by
ifferent proprietors. This, therefore,
a in the mode of performance, but is
ion of his contract, and therefore a

The plaintiffs in this case might
they having delivered to the de-
or a particular purpose, he, by a
converted it to a different purpose,
over might have been joined. I en-
bts in the course of the argument,
as the proper form of action, on
e concealing from the defendant the
might be considered such a fraud
plaintiffs, as to annul the contract
n the party must have had recourse
e misfeasance. But, upon further
of opinion, that the contract was
y void by that act of the plaintiffs.
at the defendant would have sent
me coach, even if the plaintiffs had
cel of value, inasmuch as all parcels
ore a certain hour, were forwarded
, therefore, the concealment of the
ause of the non-performance of the

A a contract,

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contract, in which respect this case is distinguished from *Batson v. Donovan*. There the foundation of the action was, the negligence of the carriers in the course of performing the contract; here, the ground of action is an absolute refusal to perform the contract. For these reasons, I am of opinion, that the plaintiffs in this case are entitled to recover, and that the rule for a new trial must be discharged.

BEST J. I had the misfortune to differ from the majority of the court in *Batson v. Donovan*, and the opinion delivered in that case continues unaltered. The circumstance from which fraud is attempted to be inferred in this case, is, that the parcel was directed to Mr. *Angier*, (who was not the owner,) in order that it might not be known to be a banker's parcel. This, however, is not a circumstance which affords any evidence of fraud as to avoid the contract; there must be a positive fraud. Here there is a mere concealment which does not amount to fraud. For these reasons, I am of opinion, that the plaintiffs are entitled to recover, and that the rule for a new trial must be discharged.

Rule discharged.

WRIGHT *against* SNELL and Others.

A carrier had given notice that all goods would be subject to a lien, not only for the

freight of the particular goods, but also for any general balance due from their real owners. Goods having been sent by the carrier addressed to the order of *J. S.* and a factor: Held, that the carrier had, not as against the real owner, any lien for the balance due from *J. S.* Query, whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the person to whom they are addressed, he would have any right to retain the goods for the balance due from *J. S.*

ASSUMPSIT for money had and received. general issue. At the trial, at the *London* session, after *Michaelmas* term, 1820, the jury found a verdict

58*l.*, subject to the opinion of the
ing case :

a manufacturer of earthenware in
forwarded by the defendants, who
thence to *London*, 30 crates of
th *May*, 1820, and 20 crates on the
dressed to the order of *E. Robinson*,
in the goods, except as commission-
e due for carriage on the two parcels
*s. 4*d.** *Robinson* was a person who
London to procure orders for goods
and other manufacturers in *Stafford-*
May, he was indebted to the defend-
58*l.* for the carriage of other goods,
elonged to the plaintiff. The plain-
to the defendants to deliver the goods
er refused to do so, without an order
Robinson, and without being paid the
to them from *Robinson*, including
58*l.*; and the plaintiffs, in order to
f the goods, agreed, under protest,
ndants to receive the sum of 207*l.*,
be paid for the goods by the pur-

The defendants accordingly re-
and, after deducting the sum of
was not disputed, and also the sum of
the question arose, paid over the
g to 92*l.* 8*s.* to the plaintiffs. It
ween *September*, 1819, and *February*,
nts had delivered to the plaintiff
ill, in which they stated "that all
nsidered subject to a lien, not only for
a particular goods, but also for any

A a 2

general

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general balance due from their respective owners, subsequently to the present dispute, the defendant delivered to the plaintiff other freight bills, by which it was stipulated "that all goods, from whomsoever received or to whomsoever belonging, should be subject to a lien, not only for the freight of the particular goods, but also for any general balance that may be due from the party to whom they are consigned or addressed."

Campbell, for the plaintiff, was stopped by the Court.

Chitty, for the defendants. By the terms of the freight note, "all goods are to be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners." The goods here were consigned to *Robinson's* order; he therefore, although in reality the factor, had the apparent ownership with the carrier, of the true owner. Now, if an agent be permitted to deal as if he were a principal, the party dealing with him, and ignorant of his representative character, is entitled to the same right against him as if he were in fact the principal. Thus he may set off against the demand from the principal, a debt due from the factor to himself. *George v. Claggett. (a.)*

ABBOTT C. J. Where goods are consigned to a carrier or order, the carrier has a right to consider himself as the owner of the goods for the purpose of delivering them, not for the collateral purpose of creating a lien on the goods, as against the owner, in respect of a general balance.

(a) 7 T. R. 359.

in the consignee; nor will any prejudice
 arise from our holding this to be the law,
 to deliver the goods in any case till the
 carriage for them is paid. I think, there-
 fore, in this case, the defendants had no lien for
 and that the plaintiff is entitled to our

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The foundation of the lien claimed, is
 that the defendants had given notice that all goods should
 be subject to a lien, not only for the freight
 on the goods, but also for any general balance
 due to the respective owners. Now, perhaps, as
 between the owner of the goods and the carriers,
 in making the bargain; the real owner however
 was not *Robinson*, the consignee, from whom
 the goods were sent to the defendants, but the plaintiff, who is
 liable for that debt. It has been argued, that
 the defendants were induced to believe *Robinson* to be the real
 owner of the goods, who had consigned
 them in the order of *Robinson*. In the ordi-
 nary trade, however, goods are consigned
 either on his own account, or in the char-
 acter of factor. There was nothing in the manner in
 which the goods were consigned to *Robinson* to induce
 the defendants to believe that they were consigned to him
 on his own account, and as his own property, rather
 in the character of factor; and if they were con-
 sidered as being on that character, it would be most unjust
 to give them this lien. For it would follow, that
 for an amount of 5000*l.*, the carriage of which
 was only 100*l.* only, be sent to a factor, he at that
 time debited to the carrier in 1000*l.*, the latter

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would have a right to keep those goods until he paid the whole sum due to him from the factor. would however be most unjust, and, in my opinion, contrary to law.

HOLROYD J. I am of opinion, that the mere consigning goods to another cannot give to a third person any right to retain the goods of the consignor, until the payment of the debt of the consignee. The case of *George v. Claggett* differs materially from the present, where the goods were consigned to a factor, who carried on business also on his own account, and he sold, and received the money, under the authority given to him, but in his own name, and it was held that the purchaser of the goods had no right to set off, in an action brought by the principal, the debt due from the factor. It is clear, that the mere possession of the factor does not give him authority to deal with the goods beyond the authority given to him: he may sell, but he cannot pledge. Now, if a factor could not pledge these goods to the carrier, as a security for his debt, by any subsequent agreement, how could he do it in this case, in consequence of any prior express or implied agreement. I am of opinion, that he cannot, by any agreement, either express, or implied from the course of dealing, subject the property of his consignor and employer to the payment of his own debts: nor can he authorise these defendants to retain the goods as a pledge and security for the money owing by him.

BEST J. I am of the same opinion. The case is one in which a party, dealing with a factor who does not, at the time of sale, disclose the name of his principal, has been allowed to set off a debt due to him from the factor.

by the principal, do not apply to the
Those cases proceeded on the ground,
the goods had allowed the factor to as-
sume the name of owner, and thereby induced others
to purchase. That doctrine has no application
to carriers who are not in the habit of ad-
vancing the consignees of goods. They have
no exact payment upon their delivery.
Saying that these goods, instead of being
addressed to the factor, had been addressed to the real
owner, would have no right to say, if
rescinded, either from the inability of
the factor to pay, or his refusal to complete the
sale, the original owner of the goods should not
be liable without paying all that might be due
to the vendee. I should doubt, if any form
of plea would be sufficient to establish a liability of
the factor, however, sufficient, in this case, to say,
that he is the owner of the goods, and there
fore transfers from him to the carriers, the words of
the bill impose any liability upon him. If any
plea arise that falls within the terms of the
bill, it would be very fit to consider whether
it is so unjust a regulation as is there
set forth. On the reasons already given, I am of
opinion that the plaintiff is entitled to the judgment of

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Judgment for the plaintiff.

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An action at common law will not lie for disturbing another in the possession of a pew, unless the pew be annexed to a house in the parish.

MAINWARING, Baronet, *against* GILES

DECLARATION stated, that the plaintiff, and at the time, &c. was and thence, until had been, and still was lawfully possessed of a messuage, with the appurtenances, situate in the of *Rosthern*, in the county palatine of *Chester*, and in, during all the time aforesaid, inhabited, and did inhabit with his family, and by reason thereof, until, &c. of right ought to have had, for himself and family inhabiting in the said messuage, with the appurtenances, the use and benefit of a certain pew in the parochial chapel of *Over Peover*, situate in the parish aforesaid, to hear and attend divine service celebrated therein, as to the said messuage appertaining. That defendant disturbed him in the enjoyment of the said pew. Whereby, &c. In the second count, the plaintiff after alleging his possession, &c. as in the first count, claimed the right, privilege, and liberty of sitting in the pew, as to the messuage belonging and appertaining thereto, yet, &c. The third count stated, that the said plaintiff before and at the time, &c. was and thence until continued, and still was lawfully possessed and entitled to the use and benefit of a certain other pew in the said chapel, in the parish and county aforesaid, to hear and attend divine service celebrated therein, &c. Plea the general issue. The cause was tried at the last Summer assizes for the county of *Chester*. The plaintiff gave in evidence an instrument under the seal of the chancellor of the diocese of *Chester*, by which

there was a certain cause or business of
 firming the taking down and rebuilding
 of the *Peover*, in the county and diocese of
 Leicestershire, and with convenient pews or seats,
 of the said chapel, as in the said
 order, at a vestry meeting held *April* 19th,
 to public notice, it was unanimously
 persons present, that three individuals
 should allot and appropriate the several pews
 of the said chapel, and also in the
 amongst such of the inhabitants or land-
 owners of the said chapelry, who had, or should
 be defraying the expences of the said
 pews; the bishop decreed a faculty
 authority to the individuals so ap-
 pointed by the vestry, and assigned and confirmed
 to them to allot and appropriate the several pews or
 seats of the said chapel, and also in the said
 amongst such of the inhabitants or land-
 owners of the said chapelry, who had, or should
 be defraying the expences of the said
 pews; the right and jurisdiction of the
 bishop, in the said gallery, and also in
 the same therein, and the power to approve
 the future disposition thereof, as from
 time to time to him seem expedient; being at all
 reserved. The plaintiff then gave in
 and made by the three commissioners, in
 which was allotted to the plaintiff, expressly in
 relation to his own occupation, and
 including the pew in question, were also
 given to the plaintiff, but without specifying any par-
 ticular, in respect of which they were so
 allotted.

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allotted. The plaintiff was proved to be the owner of other farms in the township, in addition to the land longed to the mansion-house in which he resided. The disturbance of the right was fully proved, and the court found a general verdict for the plaintiff, damages 100

D. F. Jones, in last *Michaelmas* term, obtained a writ *nisi* for a new trial, on the ground, that the document as given in evidence, was in fact merely a commission for the purpose of informing the conscience of the bishop, with a view to his subsequently granting different faculties for the several pews, and was not itself a faculty. This instrument only delegated a right to the commissioners of allotting conditionally the pews to different persons, reserving expressly the right of approbation, and of subsequently disposing of the seats to the ordinary; now a faculty should at once have allotted to the plaintiff the pew in question.

But even supposing the document to be a faculty, it was invalid, for the allotments were to be in respect of subscriptions towards the repairs of the chapel, instead of being in respect of the inhabitancy of messuages within the township. (a) It should, also, to be valid, have specified the particular messuage to which the pew was annexed. *Rogers v. Brooks*. (b) Nor could the award be coupled with it, for it did not appear that the bishop had ever approved of such award. Besides, even supposing it could be so coupled, still it did not allot the pews in respect of any particular messuage, of which the grantee was the inhabitant. *Stocks v. Booth*. (c) In the present place the plaintiff ought to have proved, upon

(a) 1 Burn. Eccles. Law, 360. (b) 1 T. R. 431. (c) 1 T. R. 431.

is being the occupier of a particular
have connected the pew with that
ne cited *Watson's Clergyman's Law*,
Albert (a), *Brabin v. Tradum (b)*, *Gib-*
S., *Kenrick v. Taylor (c)*, *Griffith v.*
ks v. Booth (e), 1 *Burn's Ecclesiastical*
s Case (f), *Langley v. Chute. (g)*

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ed cause. The original grantee of a
y may maintain an action at common
e, although the pew be not in the
a house. In *Pettman v. Bridger (h)*,
a possessory right in a pew was suf-
n a suit in an ecclesiastical court
turber. Sir *John Nicholl*, in deliver-
of the Court in that case says, "The
implies either the actual or virtual
e having power to place. The dis-
that he has been placed there by this
t justify his disturbance by shewing a
o the ordinary itself; namely, a faculty
nary has parted with the right; or if
f a faculty, there may be proof of
such immemorial usage as presumes
culty. It is necessary, in case of pre-
w, that the use and occupation of the
om time immemorial appurtenant to a
." In this case the pew was allotted
in 1812, by the award made by
culty. In *Watson's Clergyman's Law*,

(e) 1 T. R. 428.

(f) 12 Co. 105.

(g) Sir T. Roym. 246.

(h) 1 Phillim. Rep. 324.

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p. 298, it is said, "prescriptions to have seats, longing to houses, are not reasonable; for, first, been adjudged, that if an ordinary make a grant of a seat to one and his heirs, it is not good, and the given is, that a seat cannot belong to a person but to a house; for otherwise, when a person goes out of a house to dwell in another place, yet he shall retain the right which is unreasonable;" and *Brabin v. Traad* is cited. He then proceeds to say, "And an ordinary may not make a grant of a seat to a person and his heirs, I see not how he can make such a grant to bind posterity, for he cannot make a grant to a person, but to things only being capable of grant, and *Haines' case*, 12 *Coke*, 113 is cited. It appears therefore, to have been the opinion of that learned writer, that the original grant of a pew could only be to a person, and not to a person in respect of a house. In *Kenrick v. Taylor* (b) it was held, in an action for disturbing the plaintiff in his pew, that it was not necessary as against a stranger, to prove that he had repaired the pew. [Best J. In that case the pew was alleged to be annexed to the plaintiff's house, and, consequently, the disturbance of him in his enjoyment of his pew constituted a temporal injury in respect of an easement which he had in the virtue of his house. It may be very fit that, for the purpose of preserving decency and decorum in places of worship, there should be a remedy in ecclesiastical courts for disturbance in such a case; but can an action be maintained at common law, except in respect of the temporal injury arising from the disturbance of a right to a pew where it is annexed to a house?]

(a) *Popham*, 140. & 2 *Roll's Abr.* 287. n. 7.

(b) 1 *Wils.*

case has a person a right to the analogous to the right which he has; for trespass would lie for an injury or an intrusion into the former, the is by an action on the case. That reason for thinking that the action is on the ground of the pew being annexed as an easement, because an action is the proper form of remedy for the disturbance of any easement annexed to land, right of way or a stream of water.] trespass does not lie against a wrong done to the pew of another is, that the parson. A faculty for a pew can be granted, and the pew cannot be enjoyed without a particular message. The ordinary has the right to seats of the church, and he may from time to time partition them according to the circumstances. In *Brownlow and Goldesbrough's* case laid down by Lord Coke, that a pew is a part of the church house.

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contrá, was stopped by the Court.

Without giving any opinion whether the instrument given in evidence be a valid instrument or not, the opinion, that this being a pew in the church, and not in a chancel, which might be enjoyed by an individual, no action at common law could be maintained for a disturbance, because the disturbance was confined to any house. The disturbance is ecclesiastical censure only. The rule for a faculty therefore be made absolute.

BAYLEY J.

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BAYLEY J. I am of the same opinion. We leave the question untouched as to any right which the church may have in the ecclesiastical court. We only say that we cannot, in a court of common law, interfere with such a case as this, unless by the faculty the pew be annexed to a house in the parish.

HOLROYD J. Where a right is annexed to a house in the parish, an obstruction to that right is a nuisance to the occupation of the house, and I apprehend that it is only on account of the pew being annexed to the house, that the temporal courts can take cognizance of any intrusion into it. Inasmuch, therefore, as the right is not in this case annexed to a house, this is a matter of ecclesiastical cognizance alone, as the question which was discussed in this court as to the right of burying the dead in iron coffins. I am of opinion that the mere right to sit in a particular pew is not a temporal right as that, in respect of it, an action at common law is maintainable.

BEST J. concurred.

Rule absolute.

1822.

the Demise of CHARLES Earl of SURREY against WILSON, Esq.

to recover lands in the county of *Staff-*
cause was tried at the Summer Assizes,
county of *Stafford*, before *Best, J.*, when

By a private
act, passed in
the year 1720,
certain estates
were settled in
strict settle-

was reserved to the respective tenants in tail, by deed, to lease any
by settled, "for the term of three lives or twenty-one years, or for
years determinable upon the death or determination of three lives,
case there be reserved, and made payable yearly, during the con-
sual and accustomed yearly rents, boons, and services for the same;
ained therein a condition of re-entry for non payment of the said
to be reserved." By lease, dated the 6th *January*, 1785, a tenant in
mised a part of the premises thereby, settled to hold from the date of
e years, if three persons therein named should so long live, yield-
and every year during the said term, unto the lessor, the yearly rent
March and 29th *September*, by even and equal portions, the first
o the 25th *March* ensuing the date of the lease. There was a pro-
ould not be paid on those days, or if certain amerçiaments and fines
er reasonable demand, should not be paid, it should be lawful for
d assigns, to re-enter and distrain, and the distress to take away,
the rent be satisfied; and there was the following proviso for re-
ne said yearly rent should be unpaid for the space of twenty-eight
e, being lawfully demanded, it should be lawful for the lessor, his
e-enter."

e of passing the act, the premises demised by this lease had been
ther premises by the settlor's ancestor, by a lease bearing date 2d
nety-nine years, determinable upon three lives, at a yearly rent of
ne days as those mentioned in the lease of the 6th *January*, 1785,
o commence on the 25th *March* ensuing the date of the lease."
ilar power for the lessor to distrain, and a power of re-entry, upon
or twenty-eight days, upon its being lawfully demanded, and not
ent distress being found upon the premises. It did not appear
se was granted between that period and the year 1756. At that
the premises, demised by the lease of the 6th *January*, 1785, was
2l. payable at the same period as in the other leases, containing the
s and re-entry for non-payment of rent as those in the lease of the

was not a valid objection to the lease of the 6th *January*, 1785, that
able on the 25th *March* and the 29th *September*, (although the term
h *January*, and therefore there was a forehand rent, which might
er-man) inasmuch as the rent was made payable on the same days by
therefore, this was the usual and accustomed rent:

the same reason, that it was no objection to the lease that the rent
half-yearly payments, although the power required it to be payable
ly meaning a payment of rent in the year:

it was no objection to the lease that by the terms of it the landlord
er a reasonable demand, and that he was bound to detain the distress
atisfied; for this being a clause introduced for his benefit, he was not
ny right of distress which he had by common law, or of sale, under
M.;

the

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Don. Ann.
Earl of
Shrewsbury
Wilson.

Held, fourthly, that it was no objection to this lease that the clause of re-entry reserved the right of entry to the landlord upon the rent being twenty-eight days in arrear, for this was a reasonable condition of re-entry, and was conformable to the old lease. Nor was it any objection that the right of re-entry was made to depend upon the rents being lawfully demanded, for the landlord was not thereby deprived of the benefit of the 4 G. 2. c. 28. and consequently was entitled by that statute to enter without making any demand:

Held, also, that part of premises formerly demised, jointly with others, at one entire rent, might be let under the terms of this power, at a rent bearing the same proportion to the old rent that the

the jury found a verdict for the lessor of the premises subject to the opinion of the Court on the following case:

In the year A.D. 1720, a private act of parliament passed for annexing the Duke of Shrewsbury's estate to the earldom of Shrewsbury, and confirming Gilbert of Shrewsbury's settlement. By this act certain lands and hereditaments, of which the premises mentioned in the declaration were parcel, were settled to the use of George Talbot, brother of Gilbert then Earl of Shrewsbury for life, remainder to trustees to preserve, &c. And after the decease of the said George Talbot, to the use of trustees for the term of 200 years, to secure the jointure of Mary Fitzwilliam his wife, and after the determination of the said term, to the use of the first and other sons of the said George Talbot, on the body of the said Mary Fitzwilliam to be begotten, in tail male successively, with remainders over, and with an ultimate remainder to the use of all persons being issue male of the body of John Earl of Shrewsbury, to whom the title, honour, and dignity of Earl of Shrewsbury should, by virtue of the letters patent of the creation of the said earldom descend, in tail male to attend and wait upon the said earldom, and to be annexed to and descend with the same. The act contained a restriction from alienation, except on certain conditions therein specified, and the following powers of leasing; "that it shall and may be lawful to and for the successive tenants in tail, and every other person or persons to whom the said manors, lands, &c. are limited by this act of parliament successively, by any deed, or deeds, writing or writings by them respectively to

premises demised by the lease bore to the whole premises formerly demised

residue of two or more credible wit-
 ne or lease all or any part or parts
 ere, lands, &c., and premises, where-
 making such lease shall be actually
 the capital messuage, gardens, and
 pp, in the county of Oxford, to any
 , in possession, and not in reversion,
 three lives, or twenty-one years, or
 number of years, determinable upon
 mination of three lives, so as upon all
 s and leases, there be reserved and made
 ring the continuance thereof, the usual
 arly rents, boons, and services for the
 every such lease there be contained a
 ry for non-payment of the said rent and
 reserved, and so as the lessee and les-
 a lease and leases shall be made, do
 counterparts of such lease and leases."

of January, 1785, George, then
 , the eldest son and heir of the said
 Mary Fitzwilliam, his wife, was seized
 said settled estates, under the said act
 l being so seized, signed, and exe-
 cution of two credible witnesses, an in-
 of that date, comprising the premises
 mentioned, by which in consideration
 and delivery up of one indenture of
 nises thereby demise, bearing date
 ry, 1786, granted by the said earl
 for the lives of three persons there-
 of whom were since dead; and
 ion of the sum of 105*l.*, paid by
 es, for adding two lives, for and in
 B b the

1822.

Dec. 22.
 Earl of
 Fitzwilliam
 against
 Wilson.

1822.

Don dem.
 Earl of
 Stafford
 against
 Wilson.

the name of a fine or income, he the said earl did
 granted, leased, &c., set and to farm let unto the
T. Patten, all those wire-mills, new erections
 buildings, called or known by the name or name
Alton Mills, upon the river *Charnell*, &c., situate
Alton, in the county of *Stafford*, &c., to have
 hold, from the day of the date of the indenture
 for the term of ninety-nine years, if these premises
 therein mentioned should so long live, yielding and
 paying, therefore, yearly and every year, during the
 said term thereby granted, unto the said earl, his heirs,
 and assigns, the yearly rent or sum of 50*l.*, at and upon
 the two usual feast-days and terms in the year, to-wit,
 the feast-day of the annunciation of the blessed
Mary, and the feast-day of *St. Michael*, the archangel,
 by even and equal portions, clear over and above
 all manner of taxations, impositions, and payments
 what nature or kind soever, the first payment to be
 to begin and be made on the feast-day of the annun-
 ciation of the blessed virgin *Mary* next ensuing the
 date thereof. There then followed covenants on the part
 of the lessee for payment of rent, and for repairing
 the premises, and converting the mills, which were
 formerly been used as water corn-mills, into the
 condition as they were before they were converted into
 wire-mills, and for doing suit of court to the lord
 holden for the manor of *Alton*, and to obey, perform,
 accomplish, and pay all ordinances, pains, fines, amercia-
 ments, made and set from time to time in the
 said court, by the stewards, homages, or assessors thereof,
 and that in case the mills, &c., or kiln-house, &c., should
 remain out of reparation for three months after being
 ing or notice, &c., or if the said suit of court should

the lessee should pay to the lessor
 the premises were out of reparation
 three months, the sum of 20s. ster-
 ling; and for every time as the said
 and not be done, the sum of 20s. in
 The lease then contained the following
 and proviso for re-entry. "And if the
 said yearly rent shall not be paid at
 the aforesaid; or if the said amerced-
 ments, and penalties, nomine posuer, after
 and in that respect made, be not
 according to the true intent and
 indenture, then from time to time
 be lawful to and for the said Earl,
 heirs, into the said demised premises,
 distress, and the distress and distresses
 take, and carry away, detain and keep,
 until one of them be fully satisfied, con-
 tained. Provided always then, that in case if
 said yearly rent, or any part thereof,
 be unpaid by the space of *twenty-eight*
 days or either of the respective feast-days
 the same ought to be paid, as afore-
 said. *And it is demanded*, that it shall be lawful
 for the said Earl, his heirs and assigns, into all
 the said demised premises, or into any
 part thereof, in the name of the whole, wholly to re-
 turn, to have again, repossession, and re-
 cover, and their former estate; any thing
 to the contrary thereof in anywise
 Covenant by the lessor for quiet
 enjoyment, and to the premises
 mentioned in the declaration and

~~1822~~
 Not dem-
 Earl of
 Sandwich
 against
 Wilton.

1822.

Don dem.
Earl of
Surrender
against
Wilson.

demised by the above lease were, with other
mises, demised by a former indenture of lease,
February 2d, 1708, by the *Duke of Shrewsbury*
consideration of a sum of 200*l.*, habendum
lessee from the date thereof, for ninety-nine y
three persons therein named should so long live, y
and paying therefore, yearly and in every year,
the said term thereby letten, unto the duke, hi
and assigns, the yearly rent of 82*l.*, at the tw
feast days of the year, called the feast day of the A
ciation, of the blessed Virgin Mary, and the feast
Michael the Archangel, by even and equal portion
over and above all manner of taxations, imposition
payments whatsoever, the first payment to be m
the 25th *March* then next ensuing. The lease con
covenants similar to those in the lease of 1785, t
payment of rent, repairs, &c., and to do suit of cour
and to pay all fines and amerciements made from t
time in the court; and that if the premises should
of reparation for three months after notice, or
suit of court should not be done, that the
should pay, for every time the premises were s
repaired for the space of three months, the sum o
in nomine poenae, and for every time the suit of
should not be done, the sum of 10*s.*, in nomine p
There then followed a power to distrain in pro
the same terms as those used in the lease of
The proviso for re-entry differed from that in the
of 1785, in this respect, that the right to re-ent
made to depend "upon the rent being in arrear f
space of twenty-eight days, and upon its being la
demanded and not paid, and no sufficient distress
found upon the premises whereby the rent mig
satis

was reserved a liberty to the lessee, and a stipulation, as to what was the lives should drop in the first ten of lease of the 13th *January*, 1756, of the 6th of *January*, 1785,) granted of *Shrewsbury* to *Thomas Patten*, of as were demised by the indenture 6th of *January*, 1785, and on the delivery up of which the lease of the 5, was executed by the said *George*, *Shrewsbury*, was granted in consideration therein mentioned, and reserved an 32l. 10s., payable at *Lady-day* and every year, in like manner as the *February*, 1708, and the 6th *January*, in the same powers of distress and non-payment of rent as the said lease of 1785, contained. None of the other covenants, (if any,) nor any counterpart or leases had been preserved. *T. Patten*, on the lease of the 6th of *January*, 1785, in the making thereof sealed and executed part of such lease. *George* Earl of on the 21st of *July*, 1787; *Charles*, *Shrewsbury*, the lessor of the plaintiff, was of *George Talbot* and *Mary Fitz* were his grandfather and grandmother, to the said earldom, and the settled death of *George* Earl of *Shrewsbury* at the commencement of this possession of the premises in the denied, and claimed to be entitled to hold

1822.

Don dem.
Earl of
Shrewsbury v
against
Wilson.

1828

Deputy
Recorder
at the
Court

the same under the lease of the 6th January, 1785. The defendant was served with a regular half notice to quit the premises, which notice expired the day of the demise laid in the declaration.

Campbell for the plaintiff. The question is, whether the lease granted by George Earl of Strathmore, valid execution of the leasing power contained in the act of parliament. That power must be construed according to the intention of the settlor. His great intention seems to have been, that there should always be adequate firmness to support the title. The first condition to the lease is, that it reserves a foreman and therefore is in fraud of the power. The lease is made the 6th of January 1785; habendum from the day of the lease, with the reservation of 50% rent, payable yearly on the 25th of March and the 29th of September. The first payment to be made on the 25th March following the date of the lease. Now, the power expressly requires, that there shall be made payable yearly, during the continuance of the lease, the usual and accustomed yearly rents. This rent is not payable during the continuance of the lease, for rent is part of the produce of the land, and can only be payable in respect of the occupation of the premises. If any thing is to be paid before the occupation, it is not rent, but rather in the nature of a fine; here the first payment being to be made on the 25th March, six months' rent is payable before an occupation of two months and nineteen days, and at the end of the term there will be three months and six days for which no rent will be payable, because the rent is payable on the 29th September. This may materially injure the remainder man, for if the title were

desc

on the 30th September in the last year, he would not be entitled to any rent from the land between that day and the first of January following. It is a question of the power, for the rent is not a continuance of the lease. If this be the case, the whole of the settled lease, reserving the year's rent the first of January, and the remainder-man might be a year without any thing to support the title. In *Doct. &c. v. Earl of Sandwich*, it is said by *Powell J.* that if a lease be made, reserving the ancient rent, yet if it was reserved upon a day before, as if the year ended at Christmas, and at Michaelmas, it would be well, further, to which *Holt C. J.* is reported to have said, however, was a mere obiter dictum and is not an authority entitled to any weight. *Sugden on Powers*, 608, and 613; this is the case of *Doct. &c. v. Wilnot*, v. support of the contrary doctrine. It is a brief held by the late Sir *Vicary Gibbs*, Chief Justice, that that was an ejectment for possession of *Lansdowne-house*, and *Ellenborough C. J.* at the *Middlesex* assizes, term 1810. The question was, for twenty-one years, granted by the *Lansdowns*, of the premises in question was valid. The premises had been let for various years by a deed which contained the following words:—

(1) *512, Haywood, 1198.*

1822.

Doct. &c.
Earl of
Sandwich
against
Wilnot.

1899.

Dec. 4th
Lord of
the Exchequer
against
H. J. J.

tained the following power of leasing: "That he lawful for the Marquis of Lansdowne, (the one) the Earl of Wycombe, and Lord Alington respectively, when, and as they shall be lawfully in possession of the aforesaid lands, premises, &c. to demise, lease, or grant any part of the said lands and premises hereinbefore granted, of which they shall respectively be in possession, for any term or terms of years absolutely not exceeding twenty-one years, so as such leases respectively be made to take effect in possession, and not in reversion; and so as there shall be reserved, in and by such leases, demises, or grants respectively, the best and most approved yearly rent of the said lands and premises, to be reasonably had or gotten for the same, without fine, premium, or foregift, or any thing in the nature of a fine being made or taken thereof." The lease was made on the 14th September, 1809, and it was made by the Marquis of Lansdowne, of the one part, and Miss Giffard of the other, and the premises in question were demised to Miss Giffard for the term of ten years from the day of the date of the lease, at the rate of 100*l.*, payable by two even half-yearly payments on the 25th day of September and the 25th day of March in every year during the continuance of the demise. The first payment to be made on the 25th day of March next. An objection was made, that inasmuch as the rent was made payable on the 25th March and the 25th September, and the term of the lease would expire on the 14th September, there would be no rent payable under it from the 25th March preceding the expiration of the term; and on that ground Lord Ellenborough, C. J. was of opinion, that the lease was void, and

discovered. In fact, then, the most
 unjudged, impossible either to dwell on
 period from that day to the 14th Sept
 in which no man would, be payable
 can be taken between that date and
 this case there is a similar period
 to the 4th January, during
 will be payable. *Intermed. & Rld*
 guishable from this, because there
 from a prior period, and the pay-
 be extensive with the lease, and the
Blithburgh proceeds on the ground
 man could not, by any possibility, be
 tion of his interest. The old lease
 cannot vary the construction of the
 ng to the law as laid down in *Legg*
 us evidence cannot be received to ex-
 is not ambiguous. At all events,
 is in the power except to pre-existing
 reference to any act to be done after
 pater, and it is clear, that no infer-
 be drawn from the lease by *George E.*
 25th the settlement under the act of
 taken place in 1794. The lease, of
 ed only for the purpose of seeing what
 and what was the efficient and account
 for the purpose of looking at the ser-
 because there is nothing equivocal in
 as upon that subject. In *Smith & Doe*
 ed, (1) in each, lease in existence, in
 1794. *Smith & Doe* is not in to be
 I (1) *Smith & Doe* is not in to be
 and (1) *Smith & Doe* is not in to be
 and (1) *Smith & Doe* is not in to be

1822

not a
 part of
 the lease
 which
 was
 given
 to
 Wilson.

1823

1892.

Don't ask
 Earl of
 Salisbury
 acting
 Wilcox.

the time the power was created, were held to be misible for the purpose of shewing how the rent be reserved, or rather to shew what was a reasonable power of re-entry. The question in that case whether the rents were equally beneficial, and, in to ascertain that, the former leases were required to shew what construction was to be put upon the in the power, "so as there be contained in every lease a power of re-entry for non-payment of the thereby to be reserved;" and they were held to be misible, on the ground that there was an ambiguity in the power. Here there is no ambiguity whatever in the words of the power. There too, the lease was given by the maker of the power, but that is not so in this. The former leases, indeed, cannot afford any inference that the maker of the power or the legislature intended that the future leases should reserve a rent in the same manner, and payable at the same period. The legislature probably saw the inconvenience likely to arise from the old form of lease, and cautiously guarded against its being made for the future, as they had been before. This objection could not have been made, as has been suggested in *Smith v. Doe dem. E. of Jersey*, because in that case there was a covenant in the lease to pay a proportionable part of the rent that might accrue due before the last quarter day and the expiration of the lease.

The second objection to this lease is, that the power requires, that the rent shall be made payable during the continuance thereof, and it is made payable only half yearly. If the words of the power had been merely "the yearly rent," this objection could not have prevailed, but the power requires, not only that there be a yearly rent, but that it shall be payable yearly.

er absolutely requires a yearly re-
 not been duly executed. *Gilbert* on
 authority to shew, that if there be
 rent of 50%. yearly, that must be a
 of the year. And if there were an
 use at a yearly rent, payable yearly,
 doubt that a court of equity would
 on of a lease, making the rent pay-
 the year. Here too, there may be a
 remainder man, for if the lessor dies
 half year, the remainder-man will
 rent, and there can be no apportion-
 use, for the statute 11 G. 2. c. 12,
 ere the lessor dies in the middle of
 fourth resolution in Lord *Mountjoy's*
 ority to shew, that a reservation of
 where the rent was before reserved
 ar days, makes the lease void. In
chapter of Worcester's case (b), the
 on the validity of a lease granted
Elizabeth, c. 10., which gives a power to
 ns to grant leases, whereupon the
 rent or more shall be reserved.
 reserved had formerly been payable
 was made payable half yearly. The
 ed the power, did not say that the
 yable yearly, but only that the ac-
 should be reserved, and there the
 to have said, "It is sufficient if the
 reserved yearly at one time," for
 t are, "whereupon the accustomed

1800

Dox dep.
 Earl of
 SHAKESBURY
 against
 Wilson,

(b) 6 Rep. 37.

yearly

1822.

Dec. dem.
 Leach v.
 Sugden
 against
 Wilson.

yearly rent or more shall be reserved, and then the rent be yearly reserved, the statute is satisfied by reason of the word yearly." Now here, there are the words *payable* yearly. It may therefore be said, that if the rent had been not only reserved but made *payable yearly*, it would have been held to be an objection. In *Campbell v. Leach* (a), the power was only that there should be reserved the best, and the approved yearly rent. The objection was, that the rent was made payable quarterly instead of yearly, which it was answered, that the power was silent in that respect, and only required a yearly rent to be reserved. In *The Earl of Cardigan v. Montague*, reported in the *Appendix to Sugden on Powers*, p. 690, the power nearly resembled the power in this case, but the objection was never taken, and therefore that case cannot be considered as any authority.

The third objection is, that this lease restrains the power of distraining, and takes away the power of distress. In *Taylor dem. Atkins v. Horde* (b), Lord Mansfield says, "It is not sufficient that the ancient rent be reserved, it must be reserved with all the beneficial circumstances." For that purpose the remainderman should have reserved to him all the rights given by common and by statute law to satisfy himself of the rents in arrear. By common law he might distrain as soon as the rent was due; and by stat. 5 W. & M. c. 2. he might sell the distress. By the terms of the lease the lessor can only enter to distrain after a just demand in that respect, and when he has done so &c. he cannot sell the property distrained; but

(a) *Ambler*, 740.

(b) 1 Burr. 1.

tain the distress as a security, as he before the statute of the 4 and 5 W. tant must be construed for the benefit and lessor. In return for some extra- f distress, which the lessor would not l, he must be taken to have renounced law would otherwise have given him, rained himself to the acts which are and defined.

ection arises upon the proviso for re- ls of the power are, " So as in every be a condition of re-entry for non- nd rents thereby to be reserved ;" and ght of re-entry is postponed for twenty- inconvenience not before adverted to, interval between the day the rent be- e day of re-entry, is, that in this way an is deprived of all possibility of re- n the last quarter-day to the day when ry accrued. In ejectment, he must lay he twenty-eight days are expired ; he, recover rent during the interval in an profits ; he cannot bring covenant on the se has expired, and the forfeiture has the period of re-entry ; nor will use and e holding being under a demise by deed. inguishable from *Smith v. Doe dem.* he ground, that here a demand is re- rds are, " being lawfully demanded." unreasonable restriction on the right rives the remainder-man of the benefit . 2. c. 28. *Coxe v. Day (a)* is an autho-

(a) 15 East, 118.

1822.

Doe dem.
? Earl of
Shrewsbury
against
Wilson.

rity

1822.

~~Doe dem.
Earl of
Surrender
against
Wilson.~~

city in point; and, in the opinion given by *Be*
Smith v. Doe dem. Earl of Jersey (a), in the H
Lords, that learned Judge says, "Such a provis
not be sufficient under such a power." It is true
Doe dem. Scholesfield v. Alexander (b), it was held
majority of the Court, Lord *Ellenborough C.J.* dis
that where a lease, granted since the stat. 4 G. 2
contained a power of re-entry upon the rent being
for twenty-one days, the same being lawfully dem
no demand was necessary. It is to be observed, ho
that the statute 4 G. 2. c. 28., only places the su
precisely the same situation in which the king was
the statute. Before the statute, if the king gra
lease, with a power of re-entry, it was consider
neath his dignity to demand rent on the last day
year, and, without so doing, he might proceed f
forfeiture; but it had been expressly held (c), th
reversion came to the king of a lease, in which the
a right to re-enter for non-payment of rent on de
he could not maintain ejectment without making
demand; and also, if the king himself made a
reserving a rent, with a power of re-entry on no
ment of rent on demand, he could not proceed w
a demand. (d) This is an authority (and it w
referred to in the case of *Doe dem. Scholesfield v*
ander) to shew that, where there is an agreement b
the parties, there must be a demand before ejectme
be brought; and, if so, then the condition annu
the right of re-entry in this case, that the rent sh
lawfully demanded, is a restriction of the right
the lease is not a due execution of the power.

(a) 2 Brod. & Bing. 504.

(c) *Dyer*, 27. 210.

(b) 2 Maul & S. 525.

(d) *Bacon's Abr.* tit. *Rent*.

on is, that this is a lease of premises
merly demised jointly with others, at
The rent, if apportionable, is, in this
tioned; but it cannot be appor-
e person in possession of the estate
rms, or lay together two farms which
operately; for if he does either of
usual and accustomed rent is not
certainly is the practice of convey-
an express authority in settlements
The fifth resolution in Lord Mount-
ority expressly in favour of this ob-
Trinder (a) a similar question arose,
l. The statute 39 and 40 G. 3. c. 41.
aration of the law upon that subject.
ecclesiastical persons might, under
, grant leases for twenty-one years or
ng the rent most accustomably paid
next before such lease, and it had
that ecclesiastical persons could not
part at a pro rata rent, and the 39
was passed expressly to remedy that
to enable them so to do; but it does
s in tail, or at all interfere with pri-
nd if, before that statute, ecclesiastical
grant a lease of a part at a pro rata
at persons having such a power of
ments, cannot now grant a lease of a
ent.

contra, was stopped by the Court.

(a) 6 G. 3. 22.

ABBOTT

1828,

Don dem.
Earl of
Sutherland
against
Widdow.

1822.

Doct. dem.
Earl of
SHEWSEBURY
against
WILSON.

ABBOTT C. J. I am of opinion that this is a valid lease. The objections taken to it arise upon a supposed variance between the terms of the lease and the power under which it was granted. By the power under which the lease may be granted for twenty-one years, or for any term of years determinable upon three lives, and upon all and every such lease and leases, there is reserved and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, and services for the same." It appears, that on the 6th of February, 1708, (which was before the act of parliament by which the estate was settled, and prior to the passing of the 4th G. 2. c. 28) a lease had been granted of these and other premises, in which there was a proviso for a yearly and every year, during the said term, to be letten unto the said duke, his heirs and assigns, a yearly rent or sum of 82*l.*, at the two usual feasts or terms in the year, called the feast of the annunciation of the blessed virgin *Mary*, and the feast of *St. Michael* the archangel, by even and equal portions." Whether any lease was granted between that lease and the lease of the 13th January, 1756, does not distinctly appear. The next lease stated in the case, is one of the 13th of January, 1756, by which the premises which are comprised in the lease in question in the present case (being a part only of what had been demised by the lease of 1708) were demised, and the rent reserved was 32*l.* per annum, payable at *Lady-day* and *Michaelmas* every year. The lease of the 6th January, 1781, reserves a rent of 50*l.* per annum, payable at the same feasts as are mentioned in the two former leases. It is observable, too, that each of those leases is granted

half a year before the first day of payment reserved half-yearly, the first payment at a period less than half a year of the demise; and in support of the case of *Doe v. Giffard* has been cited. The case is very distinguishable from the present case the power was to lease, at the approved yearly rent that could be observed under which this lease is granted, to be reserved the usual and accustomed rent, as far as we have any evidence what the usual and accustomed yearly rent was, it appears to be yearly rent payable at *Lady-day* and *Michaelmas*. I am therefore of opinion, that a rent payable half-yearly though the right to demand it arose in the first year, is a usual and accustomed rent, and that the use of those words in the condition concerning power. Indeed, when we consider that a lease for lives, granted upon the same terms as the lease, we cannot help seeing, that an extension of time upon fresh terms, when time only is extended, it is most reasonable that the payment of the rent should be the same, and should not vary according to the time which the new lease may happen to be made.

The objection is, that there is, in the lease in question, a yearly reservation of rent, whereas it is the words of the condition contained in the lease that the rent cannot be satisfied unless the rent be paid once a year only, viz.: at the time after the making of the lease. The

C c

observation

1822.

Doe dem.
Earl of
Shrewsbury
against
Wilson.

1822.

Doz. Jem.
 Esq. of
 Bankers
 against
 Wilson.

observation I have already made, that my rent payable at *Lady-day* and *Michaelmas*, was an accustomed yearly rent, applies also to this. It is admitted, that if the words of the power "so that there be reserved and made payable the continuance thereof, the usual and accustomed rent," without the word "*yearly*" immediately before the word "*payable*," a rent reserved half-yearly have been sufficient, that is, that a payment by at the end of each half-year, or at the end of each of the year, does not prevent the rent from being of common understanding of mankind, and in compliance, a yearly rent. I cannot see any reason why the words "payable yearly during the continuance thereof," should make any difference. I cannot suppose the legislature to have intended in this case that the rent payable only once a year, which is unusual, and not beneficial to the landlord. The construction contended for would be so, that the legislature intended that the leases to be made under the act of parliament, should be different in form and effect from ordinary leases of lands and tenements, granted at beneficial rents. I cannot suppose this was intended, and, therefore, I cannot give the construction to the words in this lease. The reservation of rent in leases is "*yielding and paying yearly and every year.*" In this case the words "*yearly during the continuance thereof, the usual and accustomed yearly rent,*" which I understand to mean a yearly rent of so many pounds, by so many half-yearly or quarterly payments in the year; and I think ought to construe these words "*payable yearly*" as a reference to the common language of leases, which

g which the legislature was speaking

is, that the clause enabling the land-

restriction upon him, and injurious

as for it is said that, under this power

without making a demand, and when

cess, that he cannot sell. Now, if this

lease, it must do so, not by reason

any particular condition contained

er, but by reason of its being equi-

l nature and object, which is, that

case at a yearly rent, with the usual

s of enforcing payment. It is to be

clause itself refers not merely to the

t of 50%, but to payments in nomine

re "if it shall happen the said yearly

shall not be paid at the days and times

said amerciaments, pains, fines, and

e pence, after reasonable demand be

e lessor may distrain," It appears,

clause was copied from the lease of

at to pause before we hold, that such

om the former lease, (and which the

d the instrument, after the act of par-

ed before him) vitiates this lease. I

ever, that the landlord is abridged

any remedy for the recovery of his

erwise would have had. Independ-

the landlord has a power to distrain,

d under the distress. And I cannot

to the language of this clause as to

tended to deprive the landlord of any

ed by the common and statute law,

1822

Doc. dem.
Ex. 10
SHREVEPORT
LOUISIANA
1822

1922.

DOE dem.
Earl of
SHEWENBURY
against
WILSON.

The true construction of it appears to me to be, consider it as introduced in furtherance of the power under the common law, and I think that we cannot give it the construction contended for, unless we see clearly that the landlord, at the time of granting it, intended to reserve away the power under the common law.

The fourth objection is as to the right of re-entry. It is said, this is to be only at the end of twenty-eight days after the rent is in arrear, and the same "be lawfully demanded." Now as to the right of re-entry, it is accruing till the expiration of a given number of days. In the case of *Smith v. Doe dem. the E. of Jersey* is decided to that point. It was there decided, that the words containing this power, "so that there be conditions of re-entry in case of non-payment of rent," are to be interpreted to be a usual or reasonable condition of re-entry; and if it be so, it appears from the lease of 1708, that twenty-eight days are there given for the payment of the rent, and that the landlord can re-enter; with this additional circumstance in favour of the tenant, that if there be no sufficient distress upon the premises, the landlord may then re-enter.

Another objection is, that by the terms of the lease, the landlord is "to re-enter on the rents being lawfully demanded;" and it is said, that this puts the landlord to the necessity of making the demand, notwithstanding the stat. 4 Geo. 2. c. 28, which was made generally for the purpose of relieving the landlord from the necessity of making that demand. In *Doe dem. Schofield v. Anderson*, three of the judges of this court, Lord Mansfield and two others, though C. J. rather doubting than dissenting, decided notwithstanding the words "lawfully demanded" that, under the lease, the landlord has a right to the benefit of the statute of 4 Geo. 2. c. 28., and may re-enter. I certainly

by the common law the landlord never without making a demand. Every clause therefore, contained the words "lawfully effect, though not in terms; and therefore 1708, those words were quite nugatory. probably copied inadvertently into the sub- without considering their effect. I am of such a proviso for re-entry, which was introduced for the benefit of the landlord, construed, in consequence of the introductory words (which were nugatory in the former words (which were nugatory in the former deprive the landlord of the benefit conferred upon him by the statute 4 Geo. 2. it might have been otherwise, if the lease had expressed a covenant that he would not re-demand, or that having entered he would

the last and remaining objection, which is this: whether the rent can be apportioned or not it is competent to the owner of the estate to make any improvement or alteration in the mode of disposing of that estate? If he lets the farm, but is bound to let it altogether, as, improvement must in many cases be made, and the remainder-man be deprived of it. Independently of authority, I certainly think that that which was for the benefit of the estate might lawfully be done, and that an apportionment might be made, and that the land might be so divided, provided care was taken to apportion the rents of the farm so divided, as much rent as was served in respect of them in the lease was reserved in the whole. Lord Mountjoy's case has been

1822.

Doct dem.
Earl of
SHERWATON
against
WILSON.

1882.

Don. 1882.
Earl of 1882.
Barrington
1882.
Wilson.

cited upon this point. The doctrine there laid upon this subject, however, was not the point which Court there decided, and the very learned person whose report that doctrine is found, has, in his commentary on *Littleton*, expressly laid it down as that there may be a leasing of part, reserving a bearing the same proportion to the former rent as the part leased bore to the whole land. He says, "tenant in tail let part of the land accustomedly let and reserve a rent pro rata, or more, this is good, that is in substance the accustomed rent." Co. 44. b. and Lord *Mountjoy's* case is referred to in sentence immediately preceding. I am of opinion, the law, as so laid down by Lord *Coke*, is consonant to reason, and that it is competent to lease a part, reserving a true and fit proportion of that rent which formerly been reserved. The case of *Smith v. T.* is an authority upon that point. It is true that 39 and 40 Geo. 3. c. 41., after reciting that doubts arisen, whether ecclesiastical persons could lawfully grant separate leases of parts of lands usually demised by one lease and under one rent, enables them so to do. But we are not necessarily to infer from thence that those doubts were well founded. Acts of parliament for the purpose of removing doubts are very beneficial, because they prevent that expence of litigation which otherwise must take place, in order to have such doubts resolved. For these reasons I am of opinion, that this is a good and valid lease, and that the possession should be delivered to the defendant.

BAYLEY J. I am of the same opinion. The objection to the lease is, that it is not conformable to the leasing power contained in the statute 6 G. 1. The

to the premises in question, but in extent, lying in several different parts, it appears to me to have been the intention, that, as long as there should be a lease, the estate should not be considered as containing a leasing power, with this exception, upon all and every such lease and sublease, and made payable, yearly, during the term thereof, the usual and accustomed rents and services for the same." Now, upon these words, and, in order to ascertain the usual and accustomed rents, I take it that we may look to the previously decided point in *Smith v. Dea*. It is impossible to tell what was the value of the property which is to be the basis, unless by referring to what were the usual and accustomed rents, nor can it be ascertained what was the usual and accustomed rent, unless by referring to what has been the rent from time to time. It has been said, that the old rents referred to for the purpose of ascertaining the usual and accustomed rent, but not for the purpose of ascertaining the mode and manner in which the rent was to be paid. In order to judge, whether a rent is usual and accustomed, all that is connected with that rent must be considered, and the mode of payment are some of the circumstances from which a judgment may be formed, as to what was the usual and accustomed rent. See *Mountjoy's case*, and in the *Dean and*

1822.

Dec. 1822.
Earl of
St. Albans
against
Wheat.

1822.

*Dorset v.
Earl of
Somerset
against
Wilson.*

Chapter of *Worcester's* case, the Court did refer to the mode in which the old rent was reserved, and in comparing the new and the old reservations, no objections were made to the existing leases. No objection could not have taken place, unless it was deemed competent for them to look at the old leases, to the mode in which the old rent was reserved, for the purpose of considering whether it was a usual and accustomed rent. If the old rent is reserved quarterly, the new rent reserved is not usual and accustomed, unless it be a quarterly rent also. In this case, the words of the power are, "so as upon all and every lease and leases, there be reserved and made payable yearly." Great stress has been laid upon the word yearly, and has been contended, that the true construction of the word requires, that there should be one entire payment. I, however, consider the words "made yearly," the same as if the words had been, "made every year." In leases there is usually a covenant that the lessee shall pay yearly and every year, and reddendum, he is to pay the yearly rent of so much half yearly or quarterly payments. It appears, that the word yearly does not necessarily mean entire rent for the year, and in this case, although yearly rent might be more beneficial to the tenant, yet it would not be the usual and accustomed rent. It appears from the old lease, that the usual and accustomed rent was by a half yearly payment. It cannot be supposed, that with respect to such estates and possessions, it was intended to give an undue advantage to the remainder-man. The tenant for life and the remainder-man must have been intended to be on fair and equal terms, and that will not be the

reserved under the new leases are in the same manner and form as they were in the old. It appears, that by the old leases the rent was reserved half yearly, which was as little beneficial to the remainder-man as the reservation in this lease. Therefore, that this does not constitute a reservation of the lease in question.

The objection is, that the landlord is restricted from alienating and from selling. That does not apply to this case. It is a rule of construction, that when a reservation is introduced into a deed, or into an act of parliament, in order to confer a benefit, it is not to be construed so as to work a prejudice, or in other words, the intention of the clause is to give a further benefit. So to be construed so as to take away any thing without it. Now, applying that rule to this case, this clause must not be construed to take away from the lesser any right he had. At common law he had an unqualified right to distrain, and to sell the distress. There is another answer to this objection, that this is a reservation in the usual and ordinary manner, for the lease of 1708 contains almost the same provision with respect to the rent, and then this rent being reserved exactly in the same circumstances, it becomes in that respect a customary yearly rent.

It is also said, that twenty-eight days are allowed for the payment of the rent, before re-entry, which is also the case in the old lease, and the decision in the case of *Smith v. Doe dem. E. of Devon* is in favour of the condition in the power are, that every such lease there be contained a proviso for re-entry for non-payment of the said rent, and

1832.

Doe dem.
Earl of
Somerset
against
Wilson.

1822.

Baron
 Denham.
 Earl of
 Sandwich
 against
 Widdell.

and rents thereby to be reserved." Now this lease contains a condition of re-entry for non-payment of rent. It is said, however, that it is qualified by words "being lawfully demanded," which words are not in the lease in the case of *Smith v. Dean*. *Ex parte*. In the old lease, in this case, however, it is of the proviso of re-entry, that the rent shall be fully demanded, and, therefore, the provisos in the leases correspond in this respect, and the tenant is in possession, and the tenant in tail in remainder, to all intents and purposes, upon the same relative terms as they were at the time when the act of parliament passed.

The remaining objection is, that this is a lease of certain premises, which, at the time of passing the act of parliament, were in lease jointly with other property, and that it was not competent to the lessor to lease the property separately at a pro rata rent, which had formerly been jointly demised. I think, however, it would be most unreasonable so to construe this power. The authority in favour of such a construction is *Mountjoy's case*. That case, however, was not decided upon that point. There an acre of waste land was introduced into the lease, and the entire rent was reserved out of that acre, as well as out of the anciently demised lands. The ground of the decision was, that the accustomed rent was not confined to, and therefore not issuing out of the old accustomed letten lands. An opinion stated to have been delivered by the Judges upon the other point was extra-judicial, and was not considered that Lord Coke, in his commentary upon *Merton*, which was published some years after *Mountjoy's case*, lays it down as clear law, "that is

et part of the land accustomably letten,
 t pro rata, or more," it appears to me,
 must have been some mistake in that
 Note, or that the opinion of the profes-
 y against the doctrine there laid down.
 opinion, in this case, upon reason as
 , that the tenant in tail had a right
 lands, which, at the time of the pass-
 of parliament, were under one demise
 , provided he took care to reserve the
 at old rent which the land divided
 e property. For these reasons, I am
 the lease cannot be impeached, and,
 at the postea must be delivered to the

1822.

Dox dem.
 Earl of
 SHARESBURY
 against
 WILSON.

I am of opinion that the lease is con-
 power, and therefore a valid lease. The
 hat there be " reserved and made pay-
 ing the continuance of the lease, the
 omed yearly rents, boons, and services
 If, then, there be reserved in the lease,
 le during the continuance thereof, the
 omed yearly rents, boons, and services,
 id.. Whatever might have been my
 ome of the points, if the case of *Smith*
of Jersey had not been decided, I must
 w to be such as it was finally decided in
 t case established two points, first, that
 t be had to the former leases, for the
 rtaining what was the usual and accus-
 d for such other purposes as form the
 st upon the present occasion; secondly,
 that

1822.

Doe dem.
Earl of
Shrewsbury
against
Wilson.

that the same construction is not necessarily to be applied to the words of the power, as the same words might be received if they had been used in the lease itself. The objection is, that this rent in this lease is reserved yearly, and that the power requires that it should be reserved and made payable yearly, during the term of years, and the value thereof, &c." It is admitted, that if the word yearly had referred to the reservation only, and not to the mode of payment, this would have been a sufficient execution of the power, though the rents were payable half-yearly. I think, however, that in the ordinary parlance the word yearly, used in this and other leases, means, not a payment of rent once a year, but that the same is to be paid in or during every year, and that it seems evidently to have been the meaning of the parties who prepared this lease; for the words of the preamble are, "yielding and paying yearly and every year the yearly rent or sum of 50*l.*, upon the 25th day of September and the 29th September, by even and equal portions." So that the person who framed this lease, states that he reserved a yearly rent, and still makes it payable by two yearly payments, and that is consistent with the practice in other leases. In one sense of the word, therefore, this rent is payable half-yearly, but, in another sense, it is payable yearly, because it is payable during the year; and the latter sense can be given to the expression in this lease. I think it ought to be construed to have that meaning. Besides, if we refer to the former leases, which, according to the case of *Smith v. Doe dem. E. of Jersey* were made at liberty to do, this appears to be the usual and accustomed yearly rent; for it is payable yearly in the accustomed manner, that is, every year, by the two half-yearly payments.

A

tion is, that the rent reserved was made earlier day than it would have been payable had been made payable at the end of each year. It has been said, that the power must be construed in the same manner as if the very words of the lease were contained in the lease itself; and, undoubtedly, the lease had been yielding and paying any thing as to the times of payment, it would have accrued due until the last day of the year.

Smith v. Doe dem. E. of Jersey, a similar case, for it was contended, that if the lease had provided, that a party should re-enter, on non-payment of rent, he might immediately upon default being made. The Lords, however, decided otherwise, for the words giving the right of re-entry were not to be taken from that which they must have read in the lease itself. In this case, the rent was made payable half-yearly, and whatever was the case, if it had not appeared from the facts, that that was the usual and accustomed mode of paying the rent, I think it does appear that this was the usual and accustomed rent, and in the usual and accustomed manner.

The objection to the lease is, that the clause of the lease takes away the right of the party to distrain for the demand of the rent, and also that when the lease is forfeited, it takes away the power of selling the land. I think, however, that this being a benefit of the landlord, it does not take away the power which he had by common law, or by statute, consequently, that notwithstanding that the landlord might distrain without demand, and might sell

1822.

DOE dem.
Earl of
SHEWBOURY
against
WILSON.

1822.

*Doe dem.
Earl of
Surrendry
against
Wilson.*

sell the distress. Besides this objection goes to being the usual and accustomed rent. Now it is that this clause has been adopted from the former and therefore that this is the usual and accustomed reserved in the usual and accustomed manner.

Another objection is, that the right of entry is postponed for twenty-eight days; that point, however, determined in *Smith v. Doe dem. E. of Jersey*, and the former leases had this very clause, and therefore an answer to that objection. The same answer also to the qualification as to the rent being demanded, and I am of opinion, that the 4 Geo. apply to a case of this kind, and that notwithstanding those words the landlord, without making any demand might enter, distrain, and sell.

I am also of opinion, upon principle as well as authority, that a party may demise a part of premises for a term, and the residue to others, provided he reserve a rent. The passage referred to from *Coke upon Littleton* 44. b., is a strong authority upon that point. I think the doctrine there laid down by Lord Coke is a right exposition of the law. For these reasons in addition to others which have been given by my Lord my brother *Bayley*, it is my opinion that since the decision in the case of *Smith v. Doe dem. E. of Jersey*, never might have been the case previously, this lease should be considered as valid.

Judgment for Defendant.

(a) *Just J.* was absent at Chambers.

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Another against WILLIAMS and Others.

to recover from the defendants the value of the *East India* warrants for the delivery of a certain quantity of cotton stated in the bill. At the trial before *Abbott C. J.*, at the end of the last *Michaelmas* term, a verdict was given for the plaintiffs, damages 7337*l.*, subject to the order of the Court on the following case :

A. and B. having agreed to purchase cottons on their joint account, directed their brokers to purchase the same. These purchases having been made, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession, as the brokers of *A.* Immediately after the purchase, *B.* paid *A.* one half the value. After considerable purchases had been made, the brokers were informed that *B.* had an interest in the goods pur-

chased. *A.* directed the brokers to procure him a loan on the security of the warrants, by discounting bills drawn by *A.* upon the brokers, as a security. The whole of the warrants were deposited with *C.* by the brokers. When deposited, the brokers received directions, both from *A.* and *B.*, to deliver the goods held on their joint account, which they did, by appropriating the goods to each party, and which division was approved of by both. Before the brokers were directed by *A.* to get one half renewed, which *C.* agreed to do, *A.* drew fresh bills, and the brokers then left in the hands of *C.*, as a security for the advances, the warrants belonging to *B.* ; *C.* however, not then knowing that the first pledge did not transfer to *C.* any interest in that part of the warrants to *B.* Semble, that a sale by one of two tenants in common, of a share, is a conversion as to the share of one, and consequently that trover

lies against the party who made the sale, after the partition had taken place, the tenancy in common, if it is determined, and that being so, the second pledge was the pledge of *A.* only, and not of *B.*, which the brokers had no authority to make, and that the brokers were liable to *A.* for the same.

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the delivery of it, commonly called *East India* warrants, which were made out in the name of *Hunt*, as then employed at the sale, and were left in the possession of *Hunt* and *Sharp* as the brokers of the said *John*. The plaintiffs, immediately after the purchases of *Moon* and *Co.*, one half of the value of the said warrants. *Hunt* and *Sharp* knew that *Moon* and *Co.* were usually in the habits of making purchases on joint account, but at the time of making the first purchases in question, had no knowledge that the plaintiffs were in any way concerned. When half the purchases were completed, they were apprised that the plaintiffs had an interest in the purchases in question. It was subsequently agreed between the plaintiffs and *J. Moon* that the cottons should be divided, and accordingly in January, 1819, written directions were given by the plaintiffs to *Hunt* and *Sharp* to make division of the cottons by them on the joint account of *Moon* and the plaintiffs, and they having received similar directions from *Moon* and *Co.* proceeded to make the division by specifying in separate columns the warrants which were respectively appropriated to the plaintiffs and *Moon* and *Co.* and on the 20th February, 1819, they communicated such division to both parties, and received their approbation of the same. At the latter end of November, 1818, *Moon* directed *Hunt* and *Sharp* to procure a loan of from 20,000*l.* to 25,000*l.* on the security of the *East India* warrants then in their possession, and informed the defendants of the request of *J. Moon* applied to them to discount the acceptances of *Hunt* and *Sharp*, on bills drawn on them by *Moon* and *Co.* on the security of the whole of the warrants, and the defendants agreed to do, and accordingly eight

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months after date, were drawn by *J. Barton* and accepted by *Hunt and Sharp*, respectively 27th *February*, 1st *March*, 3d and 5th *March*, all of which were duly

These bills were discounted by the beginning of *December*, 1818; and at giving the money from the defendants, for the payment of the bills, *Hunt* acted with the defendants the whole

January, *Hunt* and *Sharp* received from the following directions, contained in a *February*, 1819: "Half the amount as all I would wish, or even nothing, if every bale of cotton I have in *London*. Half should be done by *Williams* and warrants might remain." And, in consultation was made by *Hunt* and *Sharp* to renew 10,000*l.* of the amount of the which the defendants agreed to do, by dis- bills, similar to the former, on a sufficient warrants to cover them to that amount security for such renewal. *Hunt* and *Sharp* previous to such renewal, constantly- ments that any alteration had taken property, or that the plaintiffs had any On the 2d *March*, *Sharp*, of the firm of received the warrants from the defend- press purpose of dividing them, so as worth of them away, and to return to the defendants, to remain as a sec- ed bills, and took them to his counting- purpose of making such separation; and

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having

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having done so, returned to the defendants the
belonging to the plaintiffs, and retained those
had been appropriated to *Moon* and Son; and
doing, acted by the direction of *Moon* and S
without any communication with or authority
plaintiffs. The defendants discounted two
2490*l.* 8*s.* and 2569*l.* 12*s.* respectively drawn
fore, by *Moon* and Son, upon and accepted
and *Sharp*, on the 2d of *March*; and two other
2496*l.* 15*s.* and 2564*l.* 15*s.*, on the 11th *March*
four bills amounted to 10,121*l.*, and which wer
noured when they became due. The defendan
the cottons in question for 7337*l.*

The question for the opinion of the Court wa
ther the plaintiffs were, under the circumstances,
to maintain the action of trover.

F. Pollock, for the plaintiffs. The original p
all the warrants cannot be sustained as aga
plaintiffs. And, if it could, at all events the
pledge, made subsequently to the division of
perty, cannot be sustained. There is a mate
tinction between a sale and a pledge. In the c
sale, the purchaser trusts the property; in the c
pledge, the party lending his money trusts th
dual who borrows; and if the latter has no a
to pledge, the pledge is not available. In this c
brokers, in *August*, knew the property to be
Moon and the plaintiffs, and then, by *Moon*'s d
pledged the whole with the defendants. Now,
kers had no authority to pledge the plaintiffs'
and, therefore, the pledge is not available as
them; and, if that be so, supposing the brokers

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not so, and the brokers only had authority to pl
undivided share of *Moon*, the defendants, by tak
pledge, became tenants in common with the p
and then it is clear, that trover cannot be maint
one tenant in common against another. And
does not amount to a conversion. In this
the subsequent division of the cottons, and th
the brokers having returned the plaintiffs'
instead of those of *Moon*'s, as a security for
newed bills, cannot make any difference, for all
were subject to the lien. The warrants were
to the brokers for an express, specific purpose
divide them, and to return one half to be subje
lien of the old and the renewed bills for 10,000
warrants were never out of the defendants' po
for the brokers for this purpose were their ag
the possession of the brokers, therefore, was
session of the defendants. If the bankers th
had made the division in their own office, it
that they would have had a lien upon the war
tained. The warrants were carried to the
counting-house merely for convenience, and
quently the lien continued. If there had
any previous division of the property, there wo
been no doubt upon this point, but such divisio
make any difference, being done without the k
of the pawnee, especially where the plaintiffs
allowed *Moon* to hold himself out to the worl
ostensible owner. In *Rabone v. Williams* (a), it
in the case of a factor dealing for a principal,
cealing his principal's name, that a person co

(a) 7 T. R. 360.

t to consider him, to all intents and
pal, and that though the real princi-
a in his own name, the purchaser
n he has against the factor. And so
artner unknown to the defendant at
cts with the plaintiff, the plaintiff
such secret partner in the action,
ant of his right of set off against
Deey. (a) It is clear too, that if the
ers with *Moon*, the original pledge
rs was valid.

am of opinion that the plaintiff is
I think it clear, that the pledge by
not, in point of law, operate so as to
ts any right or interest in that part
belong to the present plaintiffs. It
ever, that trover cannot be main-
e was no conversion, on the ground
e original pledge, the plaintiffs were
with *Moon*, who was the owner of an
It is laid down by Lord Chief Baron
e sells the goods of another, the very
t is such a conversion as to entitle the
over (b), and if that be so, it follows,
session of undivided shares belonging
the whole, it must be a conversion
part belonging to one, over which he
le whatever. I incline to think,
t ground, that the pledge could

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n on the Case upon Trover, E. and 2 Salk. 655.

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not operate upon the property of the plaintiff that even if there had been no partition, the sale or conversion of the undivided interest, and therefore the action of trover may be maintainable. Upon the other hand, we do not entertain any doubt. In this case, the writs of warrants were in the hands of the defendants, and a partition was made between the plaintiffs and Moon, whereby the tenancy in common was determined. After that partition, an entire new transaction took place, for Moon and Son agree not to hold the defendants to the payment of the bills originally drawn, but fresh bills are drawn in the same manner, by the same parties. It is a new pledge, and having taken place after a partition was made between two tenants in common, it was the pledge, not of an undivided interest, but of a specific chattel, of which the property at that time vested in the plaintiffs, and made by a person having no authority to pledge. I am, therefore, of opinion upon the last ground, that the plaintiff is entitled to our judgment.

BAYLEY J. It is clear law that a pawnee cannot have a better title than the pawner. At the time of the original pledge, Moon and Co. and the plaintiff were not partners with reference to these goods, but were co-owners; each of them being entitled to an undivided moiety. Moon and Co. then take upon themselves to pledge the whole, the legal operation of which would be to give to the pawnee no better title than Moon and Son had, which would be an undivided moiety only. And if the case had stopped there, Moon and Son before the pledge, and the defendant after the pledge, would have had a right to an undivided moiety only; and if they had taken

the

without any authority from the plain-
ness or implied, from the nature of the
would have been wrong doers with re-
of the plaintiffs' moiety; that would be
, and consequently a conversion of

There may be cases in which the
e of the subject matter of the tenancy
raise an implied authority in one to

But unless there be such authority,
or implied, a sale of the whole by
common is, with respect to the other,
version of his undivided part. But
not stand upon the original pledge, for
renewal of the bills took place, and all
e put into the hands of the brokers; in
might be withdrawn from the pledge,
due might continue liable, not for the
merely in respect of the new bills which
n for part of the whole debt; and the
n that transaction, as the agents of M.
right to pledge their share only; for in
time, there had been a bargain between
the plaintiffs, that certain of the war-
deemed the separate property of each
time what authority had the brokers?
ity to pledge the property of M. and
whatever to pledge that of the plaintiffs.
pledging that over which they had an
pledged that which belonged to the
ne present defendants, who took that
at the peril of the want of authority in
g it. For these reasons, I am of opi-
defendants had no right to dispose of the

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warrants in question, and that the action of trover is not maintainable.

HOLROYD J. I am also of opinion that the plaintiffs are entitled to recover the amount of their claim in the present action. It is clear, that, originally, the plaintiffs had no right to pledge the share which they had in the cottons which were purchased. It is also clear, that they were purchased by the brokers, as the plaintiffs of *Moon*, they at first not knowing that the plaintiffs had any interest in them. All the purchases, however, in point of law, made on the account of *Moon* and the plaintiffs, for *Moon* and the plaintiffs had agreed that all purchases should be made on their account, the plaintiffs having paid their moiety of the purchase money, had an interest and property in one moiety of the goods. Having that property, the brokers, whether they supposed *Moon* to have the sole property or not, acted, not, in point of law, by the direction of *Moon*, but by the direction of that which was the property of the plaintiffs. But the objection is then made to the form of the action, on the ground; that the plaintiffs and *Moon* having been tenants in common, the pawnee is now tenant in common with the plaintiffs, and, consequently, the action of trover is not maintainable. The case of *Johnson v. Anderson* (a) goes strongly to shew, that this is not such a joint-tenancy or tenancy in common, as to prevent the plaintiffs from maintaining trover. I am, however, not quite satisfied upon that point. My opinion proceeds upon the second point of the case, all the acceptances for the 20,000*l.*, which were given by the brokers, were given on the account of the plaintiffs and *Moon*, and not on the account of *Moon* alone.

vision of the warrants, were duly paid at
 the whole of that debt was extinguished.
 division of the warrants, had taken place,
 led to be tenants in common, if they ever
 I Moon had a separate property in one
 and the plaintiffs a separate property
 If. That being so, I think it perfectly
 brokers had no right to pledge the war-
 and thus become the property of the plain-
 defendants had no lien at all on those
 of course, that the objection as to the
 tion does not apply. I am of the same opi-
 am of the same opinion. It appears to
 the commencement, this was the joint
 and the plaintiffs; and if Moon were
 with the plaintiffs in this particular
 of opinion, that he had no right to
 property. A partner in a trading concern
 dispose of the partnership property, be-
 authority to do so is implied from the nature
 ; but that by no means extends to a case
 in a particular instance. Partners in
 are joint tenants as to the partnership
 in this case the plaintiffs and Moon were at
 tenants in common. Now, one joint tenant may
 dispose of the whole interest; but one tenant in
 cannot do so. If the whole property had been
 owned by Moon himself, I am of opinion that
 the plaintiffs would not have been bound,
 by a sale in market overt, and such a sale
 is not binding, not by the authority of the persons
 from the general policy of the law. But this

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is not a sale at all, but a pledge. In cases in market overt, you look to the property, but of sale out of market overt, the principle of emption applies; and in the case of a pledge, responsibility of the pawner must be relied upon. He has no authority, the pledge is not available of opinion, that this being the property of the p neither *Moon* and Co nor their brokers could, act of theirs, convey the plaintiffs' interest property to the defendants. It is said, however although they could not convey the plaintiffs' they could still convey their interest as tenants in common, and if so, that the defendants are now tenants common with the plaintiffs, and that upon that the present action is not maintainable. The case of *Jackson v. Anderson*, is an authority to show that *Moon* and the plaintiffs were not tenants in common. The ground, however, upon which I am satisfied to found my judgment is, that the tenancy common in this case was completely determined, that afterwards the separate interest of the plaintiffs was ascertained, the whole of the bills were given up, a new pledge made; and then that was an entire transaction, and when it took place, the first debt was extinguished, and the brokers had no authority to ever to convey the separate property of the plaintiffs. Upon this latter ground, I am clearly of opinion that the plaintiffs are entitled to recover.

Judgment for the Plaintiffs.

(a) This case was afterwards turned into a special verdict. *V. Ryland*, *Gow's N. P. Rep.* 132. and *Tupper v. Haythorne*, ibid.

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EDWARD HUMPHREYS *against*
ROBERTS.

NT for premises in the parish of *Holy-*
ne county of *Flint*. Plea, not guilty.
is tried before *Garro B.*, at the last
e county of *Salop*, and the question
certain premises, situate in *Bakehouse*
town of *Holywell*, passed under the
Humphreys, under which the lessor of
aimed. The will was dated the 5th *June*,
ited a marriage settlement, on the marri-
ator, by which all the messuages, lands,
belonging to the testator or his mother,
reys, situate in the county of *Flint*, were
is decease, in default of issue by his wife,
to two annuities to his mother and his
to the use and behoof of himself, his
gns for ever. The will then recited that
ny issue by his wife, and proceeded as
ow I do give and devise all the said capital
messuages, tenements, lands, hereditaments,
with their appurtenances, in manner and
g, that is to say, as to and concerning all
e or dwelling-house, with the appurtenances,
h-street, in the town of *Holywell*, in the said
int, wherein my said mother inhabits, and
ite to the *White Horse Inn*, together with
joining the same messuage; and all and
ildings and hereditaments *in the same street*
d devise the same unto and to the use of
her, *Mary Humphreys*, for her natural life."
r then, after declaring that the premises

A. by his will,
devised all his
messuage or
dwelling
house, with
the appurten-
ances, in *High-*
street, in the
town of *H.* and
all and every his
buildings and
hereditaments
in the same
street to his
mother for life,
and after her
death to *C. D.*
A. had only
one house in
the *High street*,
but behind that
house he had
two cottages
fronting a lane
called *Bake-*
house-lane.
There was no
thoroughfare
through that
lane, the only
entrance into
being from the
High-street :
Held, that the
two cottages
passed under
the will.

last

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last mentioned were to be exempt from the annuity of his mother and his wife, which he charged upon the residue of his estate, devised all the other lands comprised in the marriage settlement, except the portion limited to his mother for life, to trustees, for 500 years; in trust, to sell or mortgage the same, in order to pay his debts, and certain legacies mentioned in his will; and then, as to all his estate, as well that which was subject to the trust term of 500 years, as what was limited to his mother for life, from and immediately after her decease, he devised the same to his brother *John Humphreys*, for life, and after his death to his sons and daughters in tail, with remainder to *Hugh Humphreys* for life, and his sons and daughters in tail, with remainder to *Edward Humphreys* for life, &c. The testator died in 1788, his mother, *Mary Humphreys*, having died in his lifetime; *John Humphreys* and *Hugh Humphreys*, his brothers, died without issue; and *Edward Humphreys* is the lessor of the plaintiff. The trustees for the term of 500 years had sold, in *June*, 1790, the house in *High-street* and the two cottages in *Bakehouse-lane*, to *David Davies*; the latter sold them to *David Pennant*, whom the present defendant occupied one of the cottages. In another ejectment tried at the same assizes, in respect to the house in *High-street*, which nearly fronts the *White Horse Inn*, it was admitted that the lessors of the plaintiff were entitled to recover. *Bakehouse-lane* contains thirty houses, belonging to several owners, though not a thoroughfare, is wide enough to admit of carriages; the entrance thereto is out of *High-street* under an arch-way, a little below the house in *High-street*. The cottages are situate in *Bakehouse-lane* on the opposite side of that lane, fronting the house in *High-street*, having that and

High-street interposed between them and the Horse Inn. The testator had no house in or near *High-street*. The learned judge held, in opinion, that the two cottages passed under the will, and directed the jury to find a verdict for the plaintiff, liberty to the defendant to move to enter a rule nisi for that purpose having been refused at *Michaelmas* term.

The case shewed cause. It is quite clear, that the testator did not intend that his devise should be limited to the premises which were occupied by his son, as it had been his intention, why should he describe the premises by the words "all and every my buildings in the same street." In order to ascertain the testator's meaning, it is material to refer to the will. It begins by reciting the testator's settlement, by which some property of his as well as his own was settled to certain trustees. He mentions his intention to dispose of the property, and then introduces the clause which relates to a part of it, which clause is followed by a direction of the residue to other uses. It appears that there was no other street to which the two cottages could be said to belong, except the

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R. V. Richards. The description of premises in the will of *T. Humphreys* is extremely minute, and has been enlarged. *Ewer v. Hayden* (a), *Blague v. Huttlesham* v. *Roberts* (c), are in point. *Doe*

76, 658. (b) *Cro. Car.* 447. (c) *Cro. Jac.* 22.

v. *Collins*

1892.

Doe dem.
HUMPHREYS
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v. Collins (a) does not apply, there all the premises been occupied with the house devised. This could well known by the name of *Bakehouse-lane* therefore, would have been the proper description of the premises. [Abbott C. J. Suppose a man, having a house in the *High-street*, devised his house in the *street*, if he had a house in this *Bakehouse-lane* would not that pass?] It would; but if a man, having a house in *High-street* and another in the lane, devised *his houses* in *High-street*, the one would pass, the other would not. The general words "all my lands, tenements, and hereditaments, &c." were introduced for the purpose of referring more effectually to the devisee the premises before particularly described. *Doe dem. Tyrrell v. Lyford* is a good point, to shew that the Court cannot receive evidence to give effect to a will, where it cannot have an effectual operation without it. [Bayley J. The ground of that decision was, that there, there was no property to satisfy the will. But what *other* buildings were there in *High-street* to satisfy the will in the absence of the capital messuage occupied by the testator? The expression is not *other* buildings, but *buildings*. [Bayley J. The word *and* is accounted for by Abbott C. J. The appurtenances to the principal messuage are described as being in the *High-street*; where were they situate?] They did not abut on the *street*, but were behind the house.

Abbott C. J. Upon the words of the will, it appears to have been an intention to pass all the property the testator had in the *High-street*; and he seems to have thought, that he had something more than the premises

(a) 2 T. R. 499.

(b) 4 M. & S. 350.

the occupation of his mother. In fact, and no premises in that street except the cottage, unless these cottages are to be con- sidered within the description. There was no property to which they could be said to belong, and therefore, that they passed by the will. The bringing a non-suit must therefore be dis-

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In cases of this kind, we should en- deavour to ascertain the meaning of the testator. If the description is precise, and there are premises to which the will refers, and there are other premises also, there the will may pass. If, however, the description is not precise, and cannot satisfy the will, unless additional premises besides that which is described, then the will does not pass. In the present case, it is clear, that the testator intended to pass the cottage, and that his description is inaccurate. In the principal message, the tes- tor says, "all my buildings in the said street, and every my buildings in the said street, and other property fronting the *High-street*, and other property to which there was no access from the said street. I think, therefore, that the tes- tor's intention is to be extended beyond the words, "and other property in the court," and that the cottages in the court pass by the will. This rule must therefore be dis-

In this case, I think that the testator intended to pass the cottages in question, and that the description is sufficient for that purpose. He intended to pass the other tenements in the *High-street* be- sides the principal message. The only way to these cottages

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 DOR DEM.
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cottages was through the *High-street*, and then thoroughfare through *Bakehouse-lane*. If there had been an opening from the *High-street* to the cottages alone, they would clearly be in the street. I can see no difference from the circumstances being other houses in the court. And as there is other property to satisfy the will, I am of opinion these cottages ought to pass. The rule for a non-suit must be discharged.

Rule discharged.

(a) *Best J.* was sitting at Chambers.

REX against the Inhabitants of CHIPPING NORTON.

An indenture of apprenticeship, executed before the passing of the 44 G. 3. c. 98. must be stamped with the premium stamp within the time prescribed by the statute 8 Anne, c. 9. and where such an indenture was stamped at the time of its being produced in evidence, with the stamp required by the 55 G. 3. c. 184. but not within the time prescribed by the statute of Anne: Held, that the indenture was wholly void, and that the pauper, by serving under it, gained no settlement.

UPON an appeal against an order of two justices whereby *Jane Eely*, widow, and her six children were removed from the parish of *Aynho*, in the county of *Northampton*, to the parish of *Chipping Norton*, the sessions confirmed the order, subject to the opinion of the Court on the following case:

By indenture of the 30th October, 1794, *Jane Eely*, the late husband of the pauper, *Jane Eely*, the father of her children, not being then a freeholder of the parish of *Chipping Norton*, bound himself to *R. Phillips* of *Chipping Norton*, as an apprentice for seven years, and *R. Phillips*, in consideration of 25*l.*, the sum given with the apprentice, covenanted to instruct him in the business of a cooper. The indenture was duly stamped, with a stamp denoting the payment of the several duties, amounting in the whole to 1*l.*

by different statutes upon the indenture was not stamped with any stamp in premium, as required by the statute within the time required by that statute, making of the order of removal, and after the appeal against the order. Before the appeal, the indenture was stamped, at of 5*l.* penalty, and of 1*l.*, with a payment of a duty of 1*l.*, being the stamp used to denote the payment of the 55 *Geo. 3. c 184.*, and 1*l.* being under that statute, in respect of a given with an apprentice. The duty of the like premium under the 8 *Anne*, shillings and sixpence only, the duties both the last mentioned statutes, were, paid into the exchequer, applicable to uses. The stamps used by the commissioners the 55 *G. 3. c. 184.*, are of a different which were required to be procured, and under the 8 *Anne, c. 9.*, which were poundage stamps were used until the passing of 1798.; which imposed an ad valorem poundage stamps were disused, and the stamps they were formed were then broken up, and now in existence. *William Eely* served as clerk in *Chipping Norton*, until the expiration of years from the date thereof.

Marriott, in support of the order of removal and settlement was gained by the service of the clerk, although it was not stamped at the time.

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—
Tax
against
The Inhabit-
ants of
CHIPPING-NORTON.

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Rix
against
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ants of
Chipping-Nor-
ton.

the time of the service, nor until after the removal. Before the 44 *Geo. 3. c. 98.* an indenture of apprenticeship required two distinct stamps, a stamp and a premium stamp, and this indenture was granted before the passing of that statute, and therefore required two stamps. By the 37 *Geo. 3. c. 125.* the commissioners are authorised to stamp an indenture after they have been executed, on payment of a stamp and a penalty, and then the instrument so stamped is to be of equal force and validity as if it had been stamped in the first instance. Here the instrument has been stamped. The words of the 55 *Geo. 3. c. 182.* are very comprehensive; besides, it is sufficient if the instrument is properly stamped at the time it is produced in evidence. *Wright v. Riley (a)*, *Burton v. By (b)*, *Roderick v. Hovill (c)*, proceed on the same principle. The provisions respecting policies of insurance in the 17th Geo. 3. c. 37. commissioners are prohibited from subsequently stamping the instruments. *Edwards v. Dick (d)* shows that the Court will consider what was the object of the legislature, though the act pronounces an instrument void to all intents and purposes.

Finch, contra, was stopped by the Court.

ABBOTT C. J. I am of opinion that this instrument was void, not having been stamped within the time required by law, and consequently, that the pauper could not obtain a settlement by serving under it. By the 8 *Anne, c. 9. s. 32.* a premium stamp is imposed

(a) *Peake, N. P.* 173.

(c) 3 *Comp.* 103.

(b) 7 *Taunt.* 174.

(d) 4 *Barn. & A.* 1.

igned within the limits of the weekly
ere required to be stamped within one
e, and by s. 37. every indenture en-
re in *Great Britain*, shall be either
months, or brought within that time
officer appointed for the management
o shall indorse a receipt for the duty
on the day of payment. By s. 38.
d within 50 miles, to be computed
he weekly bills of mortality, shall be
ee months, and if at a greater dis-
onths after the date or making thereof.
ntures not stamped within the re-
hat purpose limited by the act, are
not available in any court or place,
whatsoever. Here, therefore, the
y requires that the instrument shall
the prescribed time, and declares
ission, it shall be void to all intents
that forms a distinction between this
have been cited in argument. The
ust therefore be quashed.

Order of Sessions quashed.

1822.

REX
against
The Inhabit-
ants of
CHIPPING-NOR-
TON.

1822.

POWNALL *against* MOORES.

A covenant by a lessee that he will sufficiently muck and manure the land with two sufficient sets of muck within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenants laying on two sets of muck within the three last years of the term.

COVENANT. Declaration stated that *Pownall*, being seized in his demesne, as the 8th *March*, 1808, by indenture of lease of the defendant, amongst other premises, a messuage called the *Pinfold Meadow*, to hold for the term of years. The declaration then stated a covenant by the defendant, "that he should and would sufficiently manure the said field, called the *Pinfold Meadow*, with two sufficient sets of muck, within the space of six of the last years of the said term, the last set of muck to be laid upon the said premises within three years of the expiration of the said term." The declaration stated the entry of the defendant upon the premises, and deduced a title to the plaintiff as assignee. The plaintiff averred, and alleged as a breach, that the defendant had not manured the said *Pinfold Meadow* according to the said covenant; but on the contrary, that he had manured the same in the three first years of the last six years but one, and considerably less than three years of the last three years, and all that remained, yet the defendant had not manured at all upon the said meadow. The plaintiff pleaded, that the said term of 16 years, of which the said demised premises, was still unexpired, and that the defendant demurred and joinder.

D. F. Jones, in support of the demurrer. The question intended to be raised, is whether the demurrer is good upon the true construction of the lease in question.

ant into which he has entered, by laying
are upon the meadow *at any time within*

The intention of the parties appears
at one set of manure should be laid
three, and the other set within the last
six years. It is true, that the terms of
e not expressed with exactness; but the
them a reasonable construction, and in
ty, will, according to the general rule,
most strongly against the covenantor.
good husbandry requires, that the mea-
kept in heart by manuring every three
must have been what the parties had in
The object was, not merely that the
est at the determination of the lease with
tity of manure then upon it, but that it
n a good state of husbandry from time
the lease. From its being expressed,
of manure was to be laid on within the
e last six years, it is not too much to
meaning of the covenant was, that the
ure should be laid on within the first
t six years. If a different construction
ee may then protect himself by laying on
manure within the last six months of
effect of which would be evasive of the
ovenant, and would also be contrary to
good husbandry, and injurious to the

trâ, was stopped by the Court.

. The lessee has only covenanted, that

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against
MOORE.

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**Pennell
against
Mearns**

he will lay on two sets of manure within the years of the term, and that at least one of them should be laid on within the last three years of the term. The object of the last mentioned stipulation was, that all the benefit of the manure should not be lost during the lessee's holding, but should at least continue at the expiration of the term. But the defendant has now where restricted himself from laying on more than two sets of manure within the last three years, which we think proper, and we cannot by construction extend beyond the terms of his covenant.

BAILEY J. If the plaintiff intended to rely on the argument from the course of good husbandry, an allegation to that effect should have been made upon the record. But in truth, no such argument could have availed to extend the covenant in the way which is now suggested.

HOLROYD J. and **BENT J.** concurred.

Judgment for the plaintiff.

BIRD against Pegg and Another

Where judgment of nonsuit had been given in an action brought against an infant, it is no ground of error that the infant had appeared by attorney.

UPON a writ of error brought to reverse a judgment of nonsuit in the Court of Common Pleas, it appeared upon the record, that the defendants appeared by attorney. The error assigned was, that the infant was not present at the time of his appearance, and that the time of giving judgment, was an infant under 21 years. *Comyn*, for the plaintiff in error, c

good ground for reversing the judgment, as in favour of the infant. In *Bird v. Trent* judgment against two was reversed, that one was an infant and appeared by guardian, and he referred to Serjt. *Wright* to the case of *Forwist v. Tremaine (b)*, authorities on the subject are collected.

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against
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J. There can be no doubt, that where judgment given against the infant, he may assign his attorney as a ground of error. The law is the same in an infant where a judgment has been reversed against him; but the circumstance, that the infant has been defeated in his claim against an adult, that he had no cause of action whatever, and that he is not entitled to judgment. It would be a prejudice of the infant, to allow the plaintiff to avail himself of the infant's appearing by guardian as a ground of error. Unless, therefore, there be a case in which judgment given in favour of an infant defendant has been reversed on the ground of error, we are of opinion that this judgment should be affirmed,

and that he could not then cite any such authority. He requested further time to look into the matter, and afterwards informed the court, that the only authorities he could find were *Forwist v. Tremaine*, where the original judgment had been obtained against the infant.

Judgment affirmed.

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REX *against* TOWNSEND.

By a clause in an inclosure act, a commissioner was authorised to stop up any way, provided it be done by the order, and with the concurrence of two justices, and that order was to be subject to an appeal in like manner, and under such form and restrictions as if the same had been originally made by such justices. By a subsequent clause, any party aggrieved was to be at liberty to appeal at any time within six months after the cause of complaint. Under this act, the commissioner, with the concurrence and order of two justices, stopped up a road without giving the public notices required by the 55 G. 3. c. 68.: Held, that a party aggrieved might, under these circumstances, appeal at any time within six months.

Quere, whether it be necessary to give such notices where roads are stopped up by the provisions of an inclosure act.

BY 55 G. 3. c. 43. s. 15., (an act passed for closing lands in the parish of *Hartlebury* county of *Worcester*,) the commissioner then appointed was authorised to stop up, alter, or close any old carriage road, bridle way or footpath, or leading through any of the old inclosures in the said parish, provided that no such carriage road, bridle way or footpath, leading through any of the inclosures of the said parish, should be so altered or changed without the concurrence of two justices of the peace, and which order was subject to an appeal to the quarter sessions for the county of *Worcester*, in like manner, and under such restrictions as if the same had been originally made by such justices. By section 36., any person who was himself aggrieved by any thing done in pursuance of the act, was to be at liberty to appeal to the general sessions of the peace, which shall be holden for the county of *Worcester*, within six months next after the complaint should have arisen. Under this act the said commissioner, and on the 1st of *August*, 1820, made an order with the concurrence of two justices of the peace for the county of *Worcester*, for stopping up a certain footpath leading through the old inclosures. Against this order, one *S.*

Epiphany sessions, 1821, and the order was contended on behalf of the defendants, that the Court had no jurisdiction, by the 55 G. 3. c. 68. an appeal against a sitting of two justices must be to the next sessions, for the appellant urged, that the quarter sessions had no jurisdiction, unless it could be shewn, that the order for stopping up the footway had not been required by the 55 G. 3. c. 68., previous to the *Michaelmas* sessions, 1820; and the court accordingly required the defendant to prove, that he had given previously to those sessions, and had not proved, they heard the appeal, and quashed it. This order of sessions having been moved for by certiorari, a rule nisi was obtained for the writ, on the ground, that the sessions ought to have been to the *Michaelmas* sessions.

It shewed cause. The appeal against this order was turned by the same rules as if it were an appeal from the order of magistrates for stopping up or diverting a highway. It was finally settled, in *Rex v. Justices of the Peace for the County of Middlesex* (a), that, under the general highway act, 55 G. 3. c. 68. s. 2., such an appeal must be to the next sessions, and the order made, whether any notice was given or not.

This operated as a great hardship upon persons aggrieved by the order, who might not have had time to give notice before the next sessions, and the 55 G. 3. c. 68. s. 2., which passed in the year 1815, as the *Hartlebury* inclosure act, requires, that a notice be given by the side of the way, &c., and also

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(a) 3 East, 151.

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—
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inserted in a county newspaper for three weeks making of the order, and that a like notice shall be fixed to the door of the parish church, on three *Sundays*, and then that the order shall, at the quarter sessions which shall be holden next after the expiration of four weeks from the first day on which the notices shall have been published, be confirmed; and then, by section 36 of the Highway Act, an appeal is given to any party aggrieved at the next quarter sessions. Now, as in this case no notices for stopping up the way were given before the *Michaelmas* sessions, the appeal to the *Epiphany* sessions was therefore in time. Besides, at any time an appeal was in time within the 36th section of the Highway Act, which allows it at any time within six months after the party was aggrieved. Here the order was made on the 7th *August*, and the footpath, in point of fact, was not stopped up till *October*.

W. E. Taunton and *Puller*, contra. This is a proceeding under the highway act, but the road was here stopped up by a commissioner, under an inclosure act. The highway acts have no relation to the proceedings under inclosure acts, and therefore the notices required by those acts for stopping up roads, are inapplicable to such a case as the present. It has not been usual, where roads have been stopped up under inclosure acts, since the passing of the 55 Geo. 3. c. 68., to give the notices required by that act. In this case such notices were necessary, no road, under an inclosure act, has been legally stopped up since 1815. Besides, if an inclosure commissioner is bound by part of the 2d section of 55 Geo. 3., which relates to notices, he is equally bound by the other part, which relates to the preservation of the road.

that the justices shall make the order, upon a special sessions, but the commissioner el the justices to take a view, or to hold a ons, or to give the proper notice thereof, essary. *The King v. Justices of Worcester-* e appeal can only be under section 15, of the e act, according to the rule of construction, quent clauses which are general, shall, in overned by precedent clauses, which are *Thomas v. Howel.* (b) *Altham's case.* (c) ction, then, is wholly out of the case here. ction is nearly copied from the appeal general inclosure act, under which the ap- ve been to the next sessions. (d) But if an rmable to the 15th section was impracti- quence of an alteration effected by 55 G. 3. ws that there could be no appeal at all, ns had no jurisdiction.

J. I am of opinion that this rule ought rged. By the 15th section of the inclosure eal is to be to the quarter sessions, in such under such forms and restrictions, as if the een originally made by two justices. The ontemplates an order afterwards to be made. sions then must the party have appealed, if order for stopping up the road had been o justices? By 55 G. 3. c. 68., the appeal an order must have been not to the next ons after making the order, but to the ses-

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against
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rn. & A. 228.
n. 308.

(b) 4 Mod. 69.

(d) 41 Geo. 3. c. 109. s. 8.

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—
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sions that should be holden next after the expiration of four weeks from the first day on which the notices therein required were published. In this case no notices were ever published, and, therefore, if the order of appeal had originally been made by two justices, the appeal could not have been to the *Michaelmas* sessions. The mode of appeal therefore pointed out in the 15th section was rendered impracticable, by the omission to give the notices required; but notwithstanding that omission, a party might be aggrieved by the stopping up of the road; and yet, according to the argument, the 36th section is to be controlled by the 15th, he might have no appeal whatever, until the notices were published, which might not happen. I do not, however, mean to pronounce any decision, whether it is incumbent upon a commissioner, in the case of stopping up a way, under an inclosure act, to give the notices required by the 55 G. 3. c. 68. But at all events, if the notices not having been given in this case, I am of opinion, that the mode of appeal pointed out in the 15th section having become impracticable, the party aggrieved was entitled to appeal, at any time within six months. This rule, therefore, must be discharged.

Rule discharged.

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S STANLEY, Bart. *against* FIELDEN,
CONGREVE, Esq., and TOPHAM.

for seizing and taking the plaintiff's
detaining them for two days, until the
31l. 5s. to regain them. Plea 1st, not
justification under a warrant of distress,
of 29l. 5s., due from the plaintiff, which
used upon and demanded of him, as a com-
of the statute duty that he was liable to
occupier of lands in the township of *Hooton*.
that the defendants committed the trespasses
wrong. At the trial at the spring assizes
of *Chester*, 1821, it appeared that the
detention of which this action was brought,
by the defendant, *Topham*, under a warrant
granted by *Fielden* and *Congreve*, who were
acting for the hundred of *Wirral*, in the
Chester. The warrant was to levy a sum of
the proportion of statute duty due from the

Two magis-
trates autho-
rised the sur-
veyor of a
turnpike road
which ran
through twenty-
nine townships,
to collect for
the repair of
the road a com-
position in lieu
of the statute
duty. The
surveyor was
not examined
upon oath as to
the necessity of
the composition.
He afterwards
made an assess-
ment of six-
pence in the
pound upon the
annual value of
the lands of a
particular
township
through which
the turnpike
road passed.

The sum to be
collected under

as the utmost which the surveyor of the turnpike roads could in any case
inhabitants of the township, and much exceeded what was required to
the road lying in the township into complete repair. The turnpike sur-
vorned the assessment to the surveyor of the highways of the township,
collect the sums therein mentioned. Upon a refusal to pay the sum assessed
of the township, two magistrates granted a warrant of distress to levy the
at the warrant was bad, the magistrates having no jurisdiction whatever,
that, in order to legalise the demand under the assessment, it ought to have
ascertained how many days statute duty would be required to put the road
pair, the composition being demandable only in respect of that number
duty.

in order to justify two magistrates in granting an authority to collect a com-
of statute duty, it should be made to appear upon oath, to both the magis-
that the road can be more effectually repaired by such composition.

that where the composition is to be collected in several townships, it ought
face of the authority itself, that, in the judgment of the magistrates, a
lieu of statute duty, is advisable in each particular township.

plaintiff,

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plaintiff, as owner of lands in the township of *Hooton*. It was given in evidence on the part of the plaintiff and was as follows: "Whereas, by an assessment upon the occupiers of lands, &c. within the township of *Hooton*, in the district and hundred of *Wirral*, county of *Chester*, for the purpose of raising a contribution in money, in lieu of the statute duty in kind for the maintenance and repair of such part of the highway leading from the city of *Chester*, to *Woodside Ferry*, in the township of *Birkenhead*, county of *Chester*, as is situate within the township of *Hooton*, pursuant to an order or authority of two justices acting for the said district and hundred, for that purpose, according to the directions of the statute in that behalf: Sir *T. Stanley*, Bart. was charged the sum of 29*l.* 5*s.*, as his share and proportion of the said assessment, in respect of the lands, &c. which he occupied within the township of *Hooton*; and whereas, it appearing to *R. Congreve* and *J. Fielden*, Esqrs., being justices of the peace, for the county of *Chester*, acting for the district and hundred of *Wirral*, upon the application of *J. Johnson*, one of the surveyors of the highways of the township of *Hooton*, that the said sum of 29*l.* 5*s.* had been demanded from the plaintiff, and that he had refused to pay it for the space of ten days after such demand was made: they, the said *R. Congreve* and *J. Fielden*, did summon the said Sir *T. Stanley* personally to appear before them and other justices, to be assembled at special sessions to be holden for the said district, at a place and time therein mentioned, to shew cause why he refused to pay the said sum; and whereas at special sessions, now holden for the hundred of *Wirral* at the place therein mentioned, before them, the

y had not appeared, pursuant to the
y, the said *J. Fielden* and *R. Congreve*
liable to pay the said sum, and, there-
manded all constables, &c. to levy the
ess, &c., together with the expenses of
It was objected by the counsel for the
the plaintiff's case being closed, that there
onsult, inasmuch as the warrant must
primâ facie evidence of all the facts therein
o, then it appeared, that by an assessment
order of two justices, according to the
he statute, the plaintiff was charged with
a mentioned, and refused to pay it, and
be taken to be an adjudication, binding
l regularly quashed. The learned Judges
suit the plaintiff, but reserved the point,
proceeded. On the part of the defendants
facts were proved. *Crackenthorpe*, the
e turnpike-road, between the 29th Sep-
October, 1819, applied to the clerk of the
an authority, in writing, to empower
a composition in money, in lieu of the
On the 8th October, a special sessions were
Congreve, one of the defendants, and *Wil-*
Currie, acting justices for the district of *Wir-*
and *Crackenthorpe*, the turnpike surveyor,
ut was not examined upon oath or other-
a *Congreve* and *Currie* signed the follow-
n writing. "It having been made appear
his Majesty's justices of the peace, acting
the district and hundred of *Wirral*, in
Chester, by *Harvey Crackenthorpe*, the
surveyor

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surveyor of the turnpike-roads from the city of *Chester* to the *Woodside Ferry*, in the township of *Birkenhead*, in the county of *Chester*, and from the said city to the *Assembly House* in *Park Gate*, in the township of *Neston*, in the said county, and from *Great Neston* to the *Woodside Ferry*, and from the road leading from the city of *Chester* to *Park Gate* aforesaid, to the road leading from the same city to the said *Woodside Ferry*, that the maintenance and repair of the said roads should be more effectually carried on by a composition in money than by a performance of the statute duty in kind, and they hereby authorize the said *Harvey Crackenthorpe* to make such composition, in money, in lieu of the whole of the said duty, from the several persons who are bound by the statute to perform such statute duty;" and they fixed the rate of the composition, for a cart and three horses, one driver and one labourer, by the day, at 8s. 4d. On the 12th of December, 1819, *Johnson*, the surveyor of the highway in the township of *Hooton*, received from *Crackenthorpe* a list of the several persons liable to statute duty in the township, and an account of the yearly value of the lands, &c. which they respectively occupied. On the 27th October, *Johnson* returned the list required to be returned to *Crackenthorpe*, and in that return the plaintiff was mentioned as the owner and occupier of lands and tythes of the yearly value of 1170*l.* The turnpike surveyor made an assessment upon the whole annual value of 6*d.* in the pound, the plaintiff's proportion of which was 29*l.* 5*s.* This assessment was made on the assumption that three days' statute duty was required to rep-

ship. (a) The whole line of road, for the composition was required, was forty and passed through twenty-nine towns; the demand was made upon the plaintiff, turnpike-road which passed through the town, and which was only fifty-nine yards in length, and which required perfect repair, and in *March*, 1820, the defendant offered to return 26*l.* of the sum levied, at that time, that in the course of that year only expended in repairing the road in that town. *Currie* the magistrate, who, as well as *Greene*, had signed the authority to collect the toll, proved, that he had frequently conversed with the defendant on the necessity of having a composition; the authority was signed, and that he sent the clerk to the magistrates to come prepared to sign, that he had expressed his approval of the composition, that he had frequently conversed with the defendant, that they were agreed upon the expediency of the composition, the subject was within their own knowledge, and therefore signed the authority. Upon the Chief Justice stated to the jury, that the composition, it had not been made to appear by the evidence, that the roads to the justices, that a com-

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3. c. 109. s. 5. the rate of composition, in lieu of twenty shillings annual value, is to be a fiftieth part of the annual value as the composition for one day's labour of a man and two able men. In this case that sum was eight shillings, of which two-pence was the fiftieth part; and the defendant offered six days for every 50*l.* annual value, one shilling being the sum required. But by the local turnpike act, turnpike road were entitled to require only three days' labour, several townships through which the road ran, the defendant would, of course, be sixpence in the pound.

F f

position

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position in lieu of statute duty was necessary, the surveyor ought at all events to have been in the presence of both the magistrates, where one only had examined him, and communicated information to the other; and as the result of the inquiry was to affect the property of many persons, it fit that, (if not on oath), it should at least be of a satisfactory nature. The jury found a verdict for the plaintiff. A rule nisi for a nonsuit or a new trial had been obtained by *J. Williams* in last *Easter* term, upon the ground taken at the trial, that the documents contained prima facie evidence of the jurisdiction of the magistrates, and therefore, that there ought to have been a nonsuit. Secondly, that there was no authority given on the part of the defendant, to shew that the defendant had been made sufficiently to appear to the justices, that a composition was necessary in lieu of statute duty: and thirdly, that at all events the defendant *Fielden* was entitled to a verdict, inasmuch as he had not signed the authority to the surveyor to take the composition, but merely the warrant, and the surveyor was justified in so doing, by the documents recited in the warrants. At the time of granting the rule, the Lord Chief Justice said, that it was improper for the justices should know the mode in which they were to exercise their authority. At the same time, the opinion of the Court was then very strong, that wherever a writ of parliament required justices to take certain proceedings, some matter being made to appear to them, they must be made to appear to them on oath.

Cross Serjt., now shewed cause. The warrant was given in evidence on the part of the Plaintiff.

justices with the act of the officer, cannot
 in itself an adjudication, and there was
 formal adjudication. Besides, the war-
 is a nullity, inasmuch as in order to give
 the two justices who signed the authority,
 been "*made to appear*" to them in a
 r, that the maintenance and repair of the
 be more effectually carried on by a com-
 monee, than by a performance of the statute
 Now, that "*making to appear*" should
 on a regular information laid before the
 secondly, by the examination of witnesses
 in the present instance, there was neither
 or oath. The whole proceeding therefore
 in judice, and the order by the two justices
 jurisdiction, could be no justification to
 plants who signed the warrant. The dis-
 illegal upon another ground. Supposing
 een a case in which it was proper to have
 position in lieu of statute duty in kind, it
 first to ascertain what quantity of statute
 would have been necessary under the cir-
 Although the act of parliament fixes a
 t it does not appear what smaller pro-
 e statute duty might have been sufficient,
 step should have been to have settled that

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and *J. Parke*, in support of the rule.
 ground whatever for maintaining the ver-
Fielder. By the acts of parliament it
 ed, that the justices signing the warrant
 same justices as those who signed the ori-

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ginal authority; and, in the present instance, had not, in fact, interfered in any antecedent proceedings; he was justified in presuming previous measures were correct in point of law, the plaintiff having never appealed, though a demand had been formally made upon him, and also a writ issued, to which he did not appear. It would be much to make *Fielden* responsible for signing a warrant, even supposing that the justices who signed the authority had acted upon imperfect or incorrect information. He was not bound to enquire upon the correctness of the evidence they had acted, nor had he the power, in law, of quashing or revising their adjudication. Secondly, the verdict ought not to stand against the defendants. The warrant which was signed by the plaintiff entitled the defendants to a writ of nonsuit. It imports an adjudication, such as a writ of habeas corpus requires; and an unimpeached subsisting conviction or adjudication cannot be questioned in the foundation of an action of trespass. *Massey v. Johnson* (a). *Street v. Ward*. (b) Supposing, however, the warrant was conclusive as an adjudication, the proceedings which were given in evidence were sufficient to support the conviction. stat. 54 G. 3. c. 109. embodies the provisions of the 78th c. 78., and, according to the 81st section of the same act, the plaintiff should have appealed, if there was any ground of complaint; and it is expressly provided that no proceedings shall be quashed for want of a writ of certiorari. If the plaintiff had appealed, he must have done so within a limited time, whilst the evidence was fresh, and the measure

(a) 12 East, 67.

(b) 7 T. R. 681.

the act were just commencing; whereas, can be maintained, no lapse of time will order of the justices. Upon an appeal, too, must have stated some specific objection, the present action, he casts it upon the de- prove and maintain every step of the pro- to the next point, it appears, upon the information was laid before the magis- surveyor, and it was not necessary, under parliament, that there should be evidence The very language of the act, which is, "bear," not "proved," as is found in other shew, that the legislature did not intend operative upon the justices to require evi- oath; and the reason of the difference is that which was to be made to appear was matter of fact, as in ordinary cases, but of judgment, as to the expediency of hav- composition in lieu of statute duty in kind. matter of speculation, depending upon the roads, the price of labour, the supply of, generally, the circumstances and state urhood. In such a case, therefore, the uthorised in acting upon their own know- what appeared to them to be satisfactory Here, in fact, they had communicated t was not necessary that the information r should be laid before them whilst sit- They subsequently exercised a joint judg- as sufficient. *Battye v. Gresley.* (a) But, the surveyor ought to have communi-

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against
FIELDEN.

(a) 8 East, 527.

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THE
FELLOWS

anted his information to the two justices together, that the order was not void, but voidable, and could be avoided upon appeal. *Re v. Inhabitants of St. ...* As to the last objection, it was clear, from the evidence, that the surveyor considered, that the whole statute in kind, which by the act he was empowered to do, was necessary for the repair of the main line together with the lateral branches; and it is evident, that the amount of the composition in money was calculated upon that principle. If the demand was excessive, not required by the state of the road, the justices should have appealed: but, in the present stage of proceedings, it must be taken that the whole was done in duty, if performed in kind, would have been in the calculation of the composition in money, and that was what was intended; the rate of commutation was lawfully fixed by the justices, and promulgated according to the provisions of the act.

ABBOTT C. J. I am of opinion that enough has been done to legalize the demand of this specific money from the plaintiff. It appears from the evidence, that there had been an adjudication of two main roads, that a composition should be paid in lieu of statute in kind, and also an adjudication by which the composition was fixed to be at the rate of 8s. 4d. for three horses, a driver, and a labourer. Before we can say, however, it can be ascertained how much any individual ought to pay as a composition in lieu of statute, it must be ascertained in some manner and by some competent authority how many days' labour will be

ad. Now, that certainly has not been distinct terms, in this case. It appears, that the turnpike surveyor having from the surveyor of the highways of the of the several persons liable to statute assessment at the rate of sixpence in the the whole annual value returned. He taken it for granted that he was entitled in the several townships through which d, a composition for the whole statute law, he was entitled to demand, whatever roads might be. Now, I am of opinion, such right. If there were no compositants of the several townships could only to do so many days' statute duty as would necessary for the repair of the roads; and be called for instead of the statute duty, on ought to be an equivalent for that ' statute duty. I think, therefore, in this ore the demand was made upon the ight to have been ascertained, by persons ent authority for that purpose, that so tute duty would be required to put the on into a complete state of repair, and have been notified to the inhabitants of ownship, that the composition required ence in the pound upon the annual value was calculated upon the principle that it o many days' statute duty to repair the ot having been done in this case, I think, s had no authority whatever to issue the consequently that this rule must be

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STANLEY
against
FIELDEN.

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against
FIELDEN.

BAYLEY J. I am of opinion, that the verdict in this case is right, as against both the magistrates. A magistrate is not to be answerable for granting a warrant, at the time of granting it he has documents before him (which are the acts of other magistrates) from which he was justified in granting the warrant. If the want of jurisdiction is manifest from all the papers before him at the time, then he grants the warrant at his peril. Here, on the face of the original warrant to collect the composition, there is a defect, which would have been obvious to the defendants. The composition allowed by law in lieu of statute duty, is in lieu of the statute duty required of each particular township in respect of the roads in that township. The composition to be raised, in this case, is not to constitute one fund for the entire line of turnpike-road, but is to be applied to the repair of that part of the road in the particular township. I think, that the magistrates ought, in the exercise of their discretion, on the face of the authority itself, to have shewn their opinion, in each particular township, a composition in lieu of statute duty was advisable. Here, on the face of this authority, they do not appear to have exercised any such discretion, because they only stated that the maintenance and repair of the roads can be more effectually carried on by a contribution in money than by a performance of the statute duty in kind. I therefore think, that there was a want of authority itself, which Mr. Fielden had an opportunity of observing. I also strongly incline to think, upon that point, I do not mean to intimate any opinion, that it should be made to appear upon the face of both the magistrates present that a composition

round, however, upon which I pronounce this case, is this; that assuming the magis- said, that there ought to have been a this particular township for the repair of in lieu of statute duty, (which the war- en to have said,) I think that it should e to appear what the quantum of the e to be. That is in no respect ascer- ight to have been. It has been insisted, munication made to *Johnson* by *Cracken-* required a composition calculated at 6d. as an intimation, that he considered the composition to be requisite for the repair n that particular township. From the case, I do not believe that *Crackenthorpe* any judgment upon that point. He considered the whole sum collected to fund for the repair of the whole of the have meant to collect in each township, extent which by law he could collect. on, that the communication by *Cracken-* son of itself was not sufficient, but that it e been notified to the inhabitants of the ship, that, in the judgment of the surveyor, y that there should be a composition in y days' team work, in order that the pa- ht have had the opportunity of contesting de upon them. That not having been opinion, that there was not any evidence elden to justify him in granting this war- there never has been an assessment duly ly notified to the inhabitants of the parish. t therefore be discharged.

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STANLEY
MAGISTR
FIELDEN.

HOLROYD

1828.

STANLEY
against
FIELDER.

HOLROYD J. I am also of opinion, that is right against both the magistrates, on the last stated by my Brother *Bayley*. I think, was not sufficient evidence before the magistrates to authorize them to grant a warrant. There was no assessment so as to bind any person to the payment of any specific amount of composition, the number of statute duty required for repairing the road, had not been ascertained or notified to the parish; and therefore, sufficient was not done to legalize the warrant made upon the plaintiff. The magistrates, therefore, had no right to grant the warrant.

Rule discharged.

(a) *Best J.* was absent at Chambers.

January 23d, 1828.

On the first day of this term, *William Elias*, *Christopher Puller*, *William George Adam*, *Shadwell*, and *Edward Burtenshaw Sugden*, of the Inner Temple, Esquires, took their places within the bar of the Court, and their majesty's counsel learned in the law.

1822.

ALTER *against* SMITH.Thursday,
January 24th.

a gold watch, a watch key and two
 Plea not guilty. At the trial before
 the *London* sittings after last *Michaelmas*
 and that the plaintiff, on the 22d *January*,
 pledged the articles mentioned in the de-
 the defendant, who was a pawnbroker,
 and that the plaintiff did not require
 to return them until after the expiration
 a day from the time they were pledged.
 Plaintiff then refused to return them, as-
 they had become forfeited in consequence
 having expired. The plaintiff at the time
 tendered to the defendant the amount
 and interest due in respect of the money
 the time when the demand was made,
 pledged remained in the possession of the
 they were subsequently sold by auction,
 and himself became the purchaser. At
 Lord Chief Justice was of opinion, that
 circumstances, the plaintiff was entitled to
 effect of the 39 and 40 G. 3. c. 99., not
 property absolutely in the pawnbroker after
 of a year and a day, but only giving him
 in order to reimburse himself his prin-
 cipal. The jury found a verdict for the
 plaintiff now,

A pawnbroker
 has no right to
 sell unredeem-
 ed pledges after
 the expiration
 of a year from
 the time the
 goods were
 pledged, if the
 original owner
 tender him the
 principal and
 interest due.

and for a new trial, and contended, that,
 40 G. 3. c. 99. s. 17., the property in
 the

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 against
 SMITH.

the unredeemed pledges, after the expiration time mentioned in the statute, vested in the creditor. That section prescribes, that all goods which may be pawned or pledged, shall be deemed forfeited at the expiration of one year exclusive of the day whereon the goods were so pawned as aforesaid; and that all chattels so forfeited, of a certain value mentioned, shall be sold by public auction. Now, to give effect to the word "forfeited," the owner must be taken to have absolutely lost his right in the goods. By s. 19. it is enacted, "that in case any person entitled to redeem goods in pledge, shall neglect upon the expiration of one year, from the date of pawning the same, give notice to the person to whom the same in pledge, not to sell the same at the expiration of the said one year, then such goods shall not be sold or disposed of, until after the expiration of three calendar months, to be computed from the expiration of the said year, during which term the owner of the goods shall have liberty to redeem the same." Now, by this enactment expressly reserving to the owner the right to redeem the same upon the terms mentioned in the said section, they must have considered that the right to redeem would have been otherwise extinguished.

ABBOTT C. J. I think that we cannot give the word forfeited, as used in this act of parliament the effect contended for by the defendant. It is admitted that its import is, that the party whose property is so forfeited, has absolutely lost all right to it. It is manifest, from the other provisions of this act

er the time for redeeming the property
pired, the whole interest is not divested
ginal owner. If it were, the sale would
the benefit of the pawnbroker; but, by
n of the act, it is provided, "that with
ods pawned for more than 10s., if they
or more than the principal money and
eon at the time of such sale, the overplus
pawnbroker, be paid on demand to the
e the demand shall be made within three
h sale, the necessary costs and charges of
g first deducted." The pawnbroker, there-
o derive from the sale so much as will re-
for his principal and interest, and the
e sale, and the overplus, if any, is to be
e owner. We cannot, therefore, consist-
provision, give to the word *forfeited*, as
th section, the sense contended for on the
efendant. I am of opinion, that if the
redeemed at the expiration of a year and
nbroker has a right to expose it to sale
can, consistently with the provisions of the
any time before the sale has actually taken
er of the goods tender the principal and
expenses incurred, he has a right to his
he pawnbroker is not injured; for the
is allowed him merely to secure to him
hich he has advanced, together with the
interest which the law allows to him in his
pawnbroker. For these reasons I am of
no rule ought to be granted.

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BAYLEY

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SMITH.

BAYLEY J. I am of the same opinion. of the sale is, to enable the pawnbroker to himself for the amount of the principal money and the interest due thereon. And if, before takes place, the party pledging pays the pawn principal and interest, and expenses incurred purposes of a sale are answered, and, consequently pawnbroker, in such a case, can have no right. The words "deemed forfeited and may be so" not that the things pledged shall become lute property of the pawnbroker, but only shall be so far forfeited as that the pawnbroker take steps towards a sale. I think, therefore owner having tendered to the pawnbroker all that he would be entitled to raise by sale, right to sell, and, consequently, that the pawnbroker is entitled to recover.

HELWYD J. I think that, by the 17th section property is not to be considered forfeited to and purposes, but only for the purpose of a sale to be had, by which the pawnbroker may sell his principal, and the profit which the pawnbroker has to make in lieu of interest. Now the sale is for the benefit of the owner as well as of the pawnbroker, for, if the property pledged sells for more than the principal and profit allowed to the pawnbroker of interest, he is accountable to the owner. The pawnbroker therefore, continues to have an interest in the property, and must have a right to redeem it, by which the pawnbroker all that he would be entitled to recover out of it by a sale. It is true, that by the 17th

forfeited for the purpose of sale; but that
 y answered by the pawnbroker's being
 t of what is due to him upon the pledge.
 tender to that amount has been made to
 fore he had no right to put the owner to
 e and unnecessary expenses of a sale. I
 e, that no rule ought to be granted.

am of the same opinion. The legislature
 ve intended to use the word forfeited in
 n of this act, in the sense which is con-
 y the defendant. That word generally
 ing away all right from one person, and
 right to another. The words are, here,
 be deemed forfeited, and may be sold."
 however, from the provisions of the act,
 sold for the benefit of the person to whom
 er securing to the pawnbroker his princi-
 st; for the latter is directed to account to
 wner for the overplus, if any. It is clear,
 the legislature did not intend wholly to
 terest of the original owner of the thing
 e pawnee; and, therefore, the word for-
 d in this section, cannot have the sense
 It would be absurd to hold, in this case,
 oroker had a right to sell, for by the sale,
 ntitled to no greater benefit than he would
 by accepting the sum tendered, which was
 nt of the principal and interest due. I
 re, that this rule ought not to be granted.

Rule refused.

1822.

WALTER
 against
 SMITH.

1822.

Thursday,
January 24th.

DARWIN *against* LINCOLN and LO

By the 53 G. 3. c. 141. the memorial of an annuity must contain the description and place of residence of the witnesses to the annuity deed.

A mere surety who charges with the payment of an annuity his estate in fee simple of which he was seized in possession at the time of granting the annuity, and which was of greater annual value than the annuity, is a grantor within the meaning of the 22d Geo. 3. c. 26. s. 8. and therefore in such a case no memorial is required.

ACTION on a bond, dated 31st August, 6000*l.*, the condition of which was set out in declaration, and recited an indenture of the 23d April, 1812, between the defendant, *Lincoln*, of the first part, plaintiff of the second part, *John Birkett*, thereinafter called as of *Cloak-lane London*, gentleman, of the third part, and *Henry Birkett* of the fourth part, by which the said *Lincoln* granted to *John Birkett* an annuity of 200*l.* for the lives of three persons therein mentioned, and the said annuity was made chargeable upon, and issuing out of certain premises therein described, and for better securing the payment of the annuity, the premises were demised to *Henry Birkett* for term of 500 years, in trust to pay the annuity, if the same should become due. The condition then recited another indenture of the 1st June, 1815, made between the same parties, whereby the plaintiff, at the request of *Lincoln*, charged the said premises with the payment of another annuity of 4000*l.* to *John Birkett*, for the lives of four persons therein mentioned, and the life of the survivor; and for better securing the payment of both these annuities, the said *Lincoln* and the plaintiff joined with the defendant, *Lincoln*, in two several grants and warrants of attorney to *John Birkett*, in and by which he granted several sums of 4000*l.* and 2000*l.* It then recited that the said *Lincoln* and the plaintiff joined in the said grant and other securities, and that the said premises charged with the payment of the annuities, were the property of the plaintiff, and as an indemnification to the plaintiff against any loss by reason of his having

the other defendant, agreed to enter several bond to the plaintiff. The bond was then declared to be for of the annuities by *Lincoln*, and in that, that both the defendants should in no way be harmful to the plaintiff. The breach of the bond was on the 19th *December*, 1820, two parts of the annuity of 200*l.* became due, and on the 3d *December*, 1820, two quarterly payments of 100*l.* became due; that defendant did not pay the same, and that the plaintiff became liable and paid. The defendant pleaded his bankruptcy. It is unnecessary to say more, inasmuch as the questions decided by the issues taken on the third day were substantially as follows: As to the annuity of 200*l.*, that the memorial was defective in not stating the place of residence, whereby *Lincoln* and the plaintiff were to purchase the annuity upon certain conditions mentioned. And as to the annuity of 100*l.*, the memorial was defective in not stating the place of residence of the subscribing annuity deed. It appeared by the evidence set out in the plea, that *Peter Downs*, one of the subscribing witnesses, was described merely as *Peter Birkett*. Replication as to so much of the plea as related to the arrears of the annuity of 200*l.*, that at the time of the granting thereof, the premises were freehold premises in the condition mentioned, which were then of equal or greater value than the annuity of 200*l.*, and of which the plaintiff, then being one of the grantors of the deed, was then seised in fee simple in possession.

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Upon

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Upon this issue was taken and joined. Re-
to so much of the third plea as related to the
the annuity of 100*l.* in the last breach made
that annuity at the time of the grant thereof,
upon certain freehold lands in *Great Britain*
upon the freehold premises in the condition
bond mentioned, which were then of equal
annual value than the said last mentioned annuity
and above any other annuity, and the interest
principal sums charged or secured thereon,
said grantors of the said annuity then had
wit, of the annual value of 350*l.*, and of which
hold messuage, tenement and premises, the
being then one of the grantors of the said last
annuity, was then and there seized in fee simple
session. Upon this replication issue was also
joined. At the trial before *Abbott C. J.*, at
six sittings after last *Easter* term, the jury
the premises upon which the annuities were
were of the annual value of 200*l.* But the
not of the annual value of 300*l.* On the
plaintiff, a rule nisi was obtained last *Easter*
entering up judgment for the plaintiff on a
non obstante veredicto, on the ground that
act of the 53 *G. 3. c. 141.*, did not require
and place of residence of the witnesses to
be inserted in the memorial. And on the
a rule nisi was obtained on the part of the
to arrest the judgment on the other issue for
plaintiff, on the ground that the plaintiff was
the pleadings to be the grantor of the annuity
clearly appeared from the recital in the condition
bond, that he was a mere surety, and that *Lin*

Court having ordered both the rules to
together; the case was now argued by

1822.

Dever
against
Lumsden.

Dever and *Carter*, for the plaintiff. The
having been granted before the statute
must be regulated by the provisions of
26. Now, the plaintiff is clearly a
annuity within the meaning of the 4th *et*.

For he joined in the different securities,
his own estate with the payment of the
only, the 53 G. 3, c. 141, s. 2, does not
the description of the witness should be set
memorial, but merely that it should contain
the parties, and of all the witnesses there-
where the memorial does contain the names
and witnesses. And the schedule ought
construed as to defeat the enacting clause.
case, the witness is sufficiently described
Mr. *Birkett*, and therefore, might be
one, if required. In *Haslope v. Thorne* (a),
sufficient for the plaintiff's clerk, in an affi-
davit, to state his place of abode to be the
where he is employed, though he slept at another
the witness is described in the memorial
as Mr. *Birkett*, and in the deed recited in
the latter is described as of *Cloak-lane*. In
Haslope (b), the Court held that it was not
necessary in the memorial the description by
name, or otherwise, of the persons for
whom the annuity was granted.

(a) 4 Scw. 108.

(b) 4 Burn. & A. 281.

1822.

DARWIN
against
LINCOLN.

Scarlett, contra. The 53 G. 3. c. 141. a memorial of the date of the deed, of the parties, and of all the witnesses, &c. in the form and to the effect following, and a table, shewing what the substance and memorial is to be, and under the head of 'witnesses' there is *E. F.* "of." The table, therefore, imports, that the place of residence of the parties to be inserted, and the mode given in the table of the memorial, must be considered as incorporated in the enacting clause. Secondly, *Darwin* is not bound by this annuity, for he is described in the statute as the bond as a mere surety. The legislature intended to protect a party who borrowed his money on bond, interest, and who had no marketable security. In *Lincoln* the borrower had no marketable security, therefore was the person intended to be bound by the statute. In *Amhurst v. Skynner* (a), the Court expressed his regret, that a memorial was not required in all cases. Besides, the Court construed this clause as to further the remedy given by the legislature, and they will therefore give more effect to the enacting clause than the exception.

ABBOTT C. J. There is no mention of the word grantor in act 53 G. 3. c. 141.; and the word grantor is not found in the excepting clause, and in the 7th section of an alphabetical list is required to be kept of the names and residences of the grantors of annuities. In act c. 26., the word grantor is only mentioned in the enacting clause. Now, there being no express words

(a) 12 East, 263.

word *grantor* is used in a more limited
 sense, that a man who makes his estate
 subject to an annuity, is a grantor of that
 annuity. The meaning of both those acts of parlia-
 ment is, consequently that, as far as the annuity of
 the annuity acts, and therefore, that no me-
 morial is required. I am also of opinion, that by
 the 53 G. 3. following *E. F.*, in the 53 G. 3.
 the legislature evidently intended, that the place
 of the witness should be inserted. It is of
 course that that should be done, for otherwise
 the writ might be executed in the presence of wit-
 nesses unknown to the party, and he might after-
 wards be obliged to find them out for the purpose
 of giving evidence as to what passed at the time of
 the writ, therefore, that the rule for arresting
 the writ and the rule for entering up judgment for
 the writ, notwithstanding the verdict on the issue
 for the defendant, ought both to be discharged.

I am clearly of opinion, that the de-
 scription of the witnesses must be inserted in the me-
 morial, the description given of the witness in
 the clerk of Mr. *Birkett*, is insufficient.
 The 141. s. 2., does not merely require that
 the witnesses shall be inserted in the me-
 morial, but they shall be inserted in the form and
 manner, with such alterations therein as
 the circumstances of the particular case
 may require; and the form is then given,
 in which the name of the witness, the word "of"
 and the word must have been intentionally

1822.

 DARWIN
 against
 LINCOLN.

1822.

Dever
against
Litchford

introduced, and must have had some other description, I think the intention of the legislature was, that the description of the witness should be such as to enable the party executing the deed to find the witness when required. It is possible that there may be many persons of the same name; and the inserting of the name alone would not give sufficient information. It has been said, that the description here given of the witness, as the *Dever*, is sufficient, because, by enquiring of the *Dever*, the witness may be found. But Mr. Justice refuses to give the information: whereas, if the information which the form of the deed affords, he will be able to trace the witness. It is the opinion of the court, that it would be a forced construction to excepting clause in either of these statutes, that the word "grantor" must of necessity be understood to mean the person for whose use the annuity is granted. The acts are extremely penal in their consequences, and in the different instruments executed to secure the annuity, and I think that a surety, by making himself a grantor, satisfies the words of the statutes; and he so, we are not warranted, in a penal statute, in saying that he is not within its protection. In this annuity was secured upon land, of which the plaintiff was seized in fee simple, and as he could not grant the annuity, I think that he must be considered as a grantor within the fair spirit of the statute. He pledges his estate for payment of the annuity, and he can never redeem the estate without paying the whole of the money which was paid in consideration for the annuity, and if he were seized in fee simple should be subject to

er, at least, of substituting that estate,
 money upon it by way of mortgage.
 re, a case in which the persons who con-
 vowing the money were not driven to the
 rowing by annuity, and that being so,
 ion, that it is within the meaning of
 and, consequently, that the annuity
 od. Both the rules must therefore be

1822.

 DARWIN
 against
 LINCOLN.

n clearly of opinion, that the memorial
 in a sufficient description of the witness,
 res, that the memorial shall be in the form
 mentioned in the act. Now it is here
 form nor to the effect there stated. The
 deed is described merely as clerk to Mr.
 is not the description which the act
 may be clerk for a single day, or his em-
 t be disposed to give the required in-
 e may have an interest in withholding it.
 of opinion that the rule obtained by the
 be discharged. As to the other question,
 n that the plaintiff is a grantor of the
 the 10th section of the act, and that
 judgment ought not to be arrested.

Both rules discharged. (u)

Holroyd J. was absent at Chambers.

1822.

Friday,
January 25th.BEARDMORE *against* RATTENBURY

Where, on a plea of *actio non accrevit infra sex annos*, it appeared that a writ of *testatum special capias* was issued within six years in *Michaelmas* term, and an *alias testatum capias* in *Easter* term following, but no writ in *Hilary* term: Held, that this was sufficient to take the case out of the statute, the suit being actually, although irregularly, commenced within six years, and that the continuance in *Hilary* term might be supplied at any time.

ASSUMPSIT on several bills of exchange action non accrevit infra sex annos, thereon. At the trial, before *Abbott C. J.*, at *hall* sittings after last *Michaelmas* term, it appeared that the action had been commenced by original order to take the case out of the statute, and the plaintiff gave in evidence a writ of *testatum special capias* a short time before the expiration of the six years returnable in *Michaelmas* term, 1820, and the writ non est inventus; and, secondly, an *alias testatum* issued subsequently to the six years, returnable in *Hilary* term, 1821. No writ or entry of a writ, in *Hilary* term, was produced in evidence. Lord Chief Justice thought this sufficient to take the case out of the statute, and thereupon the plaintiff obtained a verdict. And now,

Scarlett moved to set aside the verdict and nonsuit. Here there was a discontinuance, and there was no writ returnable in *Hilary* term. In *Woolford (a)*, it is indeed laid down, that when a writ is duly returned, the subsequent continuance may be entered at any time, and that a latitat may be entered at the commencement of a suit; but that is on the

(a) 6 T. R. 617.

the common practice of the Court to commence by a latitat. There is no decision, however, that a special capias is a good commencement being the ordinary practice to sue out a writ. Here, too, it should have been specially

1822.

BEARDMORE
against
RATTENBURY.

C. J. The question here is, not whether the action was regularly commenced within six years, but whether it was actually commenced within that time; and, therefore, it might be irregular to sue out a writ, but a testatum special capias in the first instance, and that the suit was then however irregularly commenced.

Two courses were open to the plaintiff, if he had been taken to the regularity of his action; one by applying to the Master of the Rolls to sue out a prior writ, the other by applying to the Court for leave to strike out the testatum special capias writ. The irregularity might, therefore, be cured, and the action might have proceeded. A latitat, equally with a testatum special capias, presupposes the existence of a prior writ, and yet it is held to be a good commencement of an action. Hence, this suit was properly commenced, the writ may be entered at any time; and therefore, the action is not discontinued by the discontinuance of the writ. A discontinuance is not a ground of nonsuit. A discontinuance was not necessary; it is necessary to amend the plea states that the plaintiff did not sue out a writ within six years, because the production of a writ within six years, would not negative the plea states, that the action was commenced within six years, which is negatived by the

1822.

BRADSHAW
against
RAPPENHART.

the production of this writ; and a general
was therefore sufficient. There is, therefore, no
for disturbing the present verdict.

Rd.

WOOD against VEAL.

In trespass and justification under a public right of way, the locus in quo, which was not a thoroughfare, had been under lease from 1719 to 1818, but as far back as living memory could go, it had been used by the public, and lighted, paved, and watched under an act of parliament, in which it was enumerated as one of the streets in *Westminster*. After 1818, the plaintiff, who previously lived for 24 years in its neighbourhood, inclosed it:

Held, that under these circumstances, the jury were well justified in finding that there was no public right of way,

inasmuch as there could be no dedication to the public by the tenants for 99 years any one, except the owner of the fee. *Quere*, whether there can be a public right of way which is not a thoroughfare.

TRESPASS for breaking and entering a close and close of the plaintiff in the parish of *Westminster*, and pulling down his fence, erected. The defendant justified the trespass as a public right of way. At the trial at the *Westminster* sittings, after last *Michaelmas* term, before *Abraham* it appeared that the locus in quo, which was *Little Abingdon-street, Westminster*, was not a public right of way, but that, as far back as living memory could go, it had been used by all persons desirous of going to and from the *Westminster* and that in 11 G. 3. it had been enumerated in the act of parliament then passed for paving, cleaning, and lighting the squares, streets, and lanes of *Westminster*. That the commissioners had previously paved and lighted it, and that watchmen were stationed there, &c. &c. On the part of the defendant it appeared that in the year 1719, a lease for 99 years of the plaintiff's premises, including the yard and garden, had been granted by the then owner of the premises, which having expired in 1818, the plaintiff, in 1818, inclosed it for 24 years previously lived in the neighbour-

in question. The Lord Chief Justice
 is to say, whether they thought there had
 been a dedication to the public previously to 1719,
 that in that case they ought to find for
 the plaintiff; but if not, then he told them, that there
 was no dedication to the public, except by the
 payment of a fee; and that the permission by the
 Statute of 1719 would not bind the landlord; and
 that the Statute of the lease for 99 years, which
 was explained, in a great degree, the use
 of the land, as not being referable to a dedication
 to the public. Under this direction, the jury found
 for the plaintiff. And now,

1822.

Woods
 against
 Viall.

was directed for a new trial. In this case the jury
 has been directed to presume a dedication to
 the public. Here, as far back as living memory could
 go, the land had been used as a public place, which having been
 used as a *linsey-lane*, had subsequently acquired
 the character of a *public place*, and had been so
 by a public act of parliament for lighting and
 cleansing. Under this act it had been lighted
 so that this case is stronger than that of
 (a), where the lighting only was held to
 constitute a public way. As to its being
 a public place, that is not important; for Lord
 in *Stigby Charity v. Merryweather* (b), held
 that the circumstance could make no difference. In
 (c), Lord *Ellenborough* decided that the
 knowledge of the use by the public,
 was not material. Now, in this case, the present plain-

360. (b) 11 East, 375. n. (c) 4 Campb. 16.

tiff

1822.

WOOD
against
VEAL.

tiff had, for 24 years, lived in the neighbour
must have known of the public use of this str

ABBOTT C. J. I have great difficulty in
that there can be a public highway which is n
roughfare, because the public at large cannot
in the use of it. In this case, however, I left
jury to consider, whether there had been a ded
the public, telling them that a highway mi
although it was not a thoroughfare. Nothing
the lessee without the consent of the owner o
would give the right of way to the public.
the land was demised by the lease of 171
expired in 1818, it seems to me, that the
question to consider was, whether there had
dedication to the public before 1719, or, sub
to that period, with the consent of the owner
fee. I am still of opinion that the case was p
properly to the consideration of the jury, and
they have found a right verdict.

BAYLEY J. It is not necessary to decide u
present occasion, whether there can be a highwa
is not a thoroughfare. For the point in this
whether, supposing that to be so, there has
dedication of this way to the public. Now, in
give the public that right, it must be done with t
sent of the owner of the fee; for where it is g
an individual having a limited right, it can only o
for a limited period. Here, upon the evidence,
pears that the permission was given, if at all,
lessee for 99 years. I think, therefore, that th

left to the jury, and that they have found
dict.

1822.

Wood
against
Veat.

J. I am of the same opinion. The
ord *Kenyon* in the *Rugby Charity v. Merry-*
newhat shaken by the observations of Lord
eld in *Woodyer v. Hadden*. (a) But it is
to determine that question here, for this
a determined upon principles which assume
the *Rugby Charity v. Merryweather* to be

I am quite satisfied with the verdict which
e found in this case, and with the manner
question was left to them. No man has a
ct for the learned judge who decided the
Rugby Charity v. Merryweather than I have,
that that decision was a departure from
ally received in the law. If a road be for
dation of particular persons only, it is not
l, and, therefore, I can see no reason why
ts in a street which is not a thoroughfare
ut up a fence at the end of it and exclude
It is not, however, necessary to decide that
his case, because, independently of it; the
entitled to the verdict.

Rule refused.

(a) 5 Tamm. 142.

1822.

Tuesday,
January 29th.

DOE on the Demise of SPENCER against

A testator devised a copyhold estate to his wife for life, remainder to his son, and the heirs of his body, and there was no custom in the manor to entail copyholds; the son survived his mother, and had issue, and having become bankrupt, he died before admittance, and before any bargain and sale was executed by the commissioners of this estate: Held, that he took a fee simple conditional at common law, and that the commissioners might execute a valid conveyance of the estate after his death, pursuant to 1 Jac. 1. c. 15. s. 17.

EJECTMENT to recover a copyhold divided into tenements with their appurtenances situate at *Long Melford*, in the county of *Suffolk*. The cause was tried at the last Spring assizes for the county of *Suffolk* before *Graham B.*, when a verdict was found for the plaintiff, lessor of the plaintiff, subject to the opinion of the Court upon the following case. The grandfather of the plaintiff being seised in fee, according to the custom of the manor of the rectory of *Melford*, the estate for which this action was brought, he had duly surrendered the same to the use of his will as follows: "First, I give and devise unto *Mary* all my freehold and customary, or copyhold lands, or tenements, with the outhouses, &c. the same being surrendered to the use of my will, situate at *Melford*, and now in the several occupations of *Mary* and others: to hold the same to her for the term of her natural life, and from and after the decease of *Mary* then I give and devise unto *Paul Spencer*, my son, that messuage and tenement, with the outhouses now in my own occupation; to hold the same unto the heirs of his body lawfully to be begotten for ever. But in case my son shall die without issue, and shall not survive his mother; then I devise all the last mentioned premises with the appurtenances unto my two daughters, *Alice* and *Sarah*, to hold the same to them and their heirs, as tenants in common, as joint tenants. The testator, shortly after made

and his wife *Jane Spencer*, was, on the 20th 1783, admitted under the will to the copy-
s so devised to her for life, &c. In 1802,
ing *Paul Spencer* her son living, who died
April, 1803, without having been admitted
ies devised to him under the will of his
d *Spencer* left *William Spencer*, the lessor of
the only son of his body him surviving,
(or,) who was admitted to the premises in
a special court held the 6th day of *June*,
the 13th *December*, 1793, a commission of
issued against *Paul Spencer*, the father of
the plaintiff, upon which he was found and
bankrupt. On the 2d *December*, 1802, the
contracted for the sale of the premises in ques-
the 26th *September*, 1805, the commissioners
commission against *Paul Spencer*, together
gness, conveyed the premises in question,
and sale inrolled, to the defendant in fee for
consideration. And on the 3d *July* fol-
defendant was admitted in the Manor
the bargain and sale. The question for
of the Court was, whether any, and what
d by the bargain and sale executed after
the bankrupt to the defendant.

the lessor of the plaintiff. The effect of
to give to the bankrupt an estate tail,
at the land had been freehold; but as it
l, and no custom is found to exist within
r entailing, it is only an estate upon con-
an estate, however, is within the meaning
of 21 *Jac.* 1. c. 19. s. 12. Then if so, the
question

1822.

DOX dem.
SPENCER
against
CLARK.

1822.

Dor dem
SPENCER
against
CLARK.

question is, whether the provision of 1 Jac. s. 17. can be applied to a subsequent act of bankruptcy. That point has never been decided. In *v. Blecke (a)*, the bankrupt died after the bargain and sale, and before the admittance, and all that was decided was, that upon admittance the bargain and sale was to pass the estate in him by relation, from the time of the bargain and sale. So in *Beck dem. Hawkins v. Beck*, it is quite clear, although not so expressly stated, that the bargain and sale must have been executed before the death of the bankrupt. There is no case, therefore, in which it has yet been held, that 21 Jac. 1. c. 19. s. 12. can be coupled with 1 Jac. 1. c. 15. s. 17.; and upon principle it ought not to be. It would be a strong construction, and its construction would go to deprive the issue in tail of their right, which they had become vested by the death of the bankrupt in tail; and besides, copyholds are not mentioned in 1 Jac. 1. c. 15. s. 17. Here, too, the bankrupt died without being admitted. *Vernon v. Vernon. (c)*

Cooper, contra. In *Crisp v. Pratt (d)* it was held, that copyholds were within the purview of all the statutes relating to bankruptcy, viz. 13 Eliz., 1 Jac. 1., and 21 Jac. 1. and it was there added, that those statutes ought to be construed liberally, to make as strong provision as they may against the bankrupt. If so, it may be contended, that the provision of 1 Jac. 1. c. 15. s. 17. may be construed with 21 Jac. 1. c. 19. s. 12., and there is no doubt in this case. But it is not

(a) Cro. Car. 568.

(c) 7 East, 8.

(b) 1 Wils. 271.

(d) Cro. Car. 568.

his. For the estate of the bankrupt under a fee simple conditional at common law, condition being fulfilled, his estate might have passed away during his life without the assistance of the commissioners. *13 El. c. 7. s. 11.*, there can be no doubt that *1 Jac. 1. c. 15.* applied to the case. As to the want of admittance for life, it is unimportant. For the admittance for life was, for this purpose, an admittance in remainder.

J. I am of opinion, that the effect of the decision in the case, was to give to the bankrupt a fee simple conditional, the condition being, that the estate should become absolute on his having issue and surviving his mother. Both these events happened, and the fee simple conditional vested in him, his estate having been also admitted, in pursuance of the Statute of Copyhold property. He, therefore, under the Statute, had a good title against all the world, and the commissioners of bankrupts might clearly have acted during his lifetime, pursuant to the Statute of *Eliz. c. 7. s. 11.* Here, however, his death occurred before the contract which had been made pursuant to the Statute had been completed. The Statute of *5. s. 17.* provides, that the death of the bankrupt should not prevent the commissioners from dealing with the estate. For it enacts, that if the bankrupt die, the commissioners shall distribute his goods, lands, and tenements, they may still proceed in execution, in and out of the commission, for and concerning his goods, lands, tenements, hereditaments and debts, in such sort as they might have done if he were living. But it is

H h

said,

1822.

DOX dem.
SPENCER
against
CLARK.

1832.

—
 Doe dem.
 versus
 against
 Clark.

said, that copyholds are not within this clause, without any authority on the subject, I should have given my opinion, that the word land there found was to be taken to every species of land mentioned in the 13th statute, whether copyhold or freehold. It was, however, decided, in the case of *Crisp v. Pratt*, that copyholds were within the statute 1 Jac. c. 15. That is an authority expressly in point. Taking therefore, the statute together, it seems to me perfectly clear, that a bargain of bargain and sale executed by the commissioners operated to defeat the estate, which would otherwise have vested in the lessor of the plaintiff, under his grandfather's will.

BAYLEY J. It is not necessary to determine in this case, whether an estate tail could be divested by the death of the bankrupt, by a bargain and sale made by the commissioners; for this being a copyhold estate, and there being no custom stated to exist in the manor for entailing copyhold, the estate taken by the bankrupt was a fee simple conditional at common law. Then, this being an estate in fee simple conditional at common law, as soon as the bankrupt died and issue, he had the same power over the property as if it had been seized of it in fee simple absolute. Now, by the statute of *Elizabeth*, the commissioners were given power to dispose of land so held by the bankrupt, and during his life they might have done so by a conveyance. In such cases, after the death of the bankrupt, the same power was given to them by the statute 21 Jac. c. 15. s. 17. The object of the statute 21 Jac. c. 15. s. 12, was different. Previously to that act, the commissioners had no power to compel the bankrupt to make issue by a recovery; and therefore, it was not

... a valid conveyance of entailed property
 ... bankrupt. The legislature thought this
 ... therefore enacted, that the commissioners
 ... of such property by deed indented and
 ... before that statute, the commissioners
 ... to dispose of an estate in fee simple con-
 ... said, that there was not any admittance of
 ... but the admittance of the tenant for life
 ... The lord of the manor indeed might have
 ... to be admitted to secure his fine. But
 ... gers were concerned, he was a complete
 ... that time. Besides, if that objection were
 ... it would put an end to the plaintiff's title
 ... the whole, I am of opinion, that the de-
 ... tited to our judgment.

J. I am of opinion, that the estate passed
 ... and sale, notwithstanding the previous
 ... bankrupt. It is established by many cases,
 ... tance of the tenant for life is a sufficient
 ... of those in remainder, although not such as
 ... of the manor of his fine. That being so,
 ... s, as to the nature of the estate taken under
 ... that was a fee simple conditional, there is an
 ... e. But as no custom is found for entailing
 ... the manor, the estate taken by the bank-
 ... e simple conditional, and therefore, might,
 ... e of the bankrupt, have been conveyed by
 ... oners under the provisions of the 13 *Eliz.*
 ... The clause, therefore, in the 1 *Jac.* 1. c. 15.
 ... e to apply to the present case. The
 ... 19. s. 12. does not apply to it. That act
 ... red the commissioners to bar the issue, where

1822.

Non dem.
 STRECKER
 against
 CLARK.

1822.

DOE dem.
SPENCER
against
CLARK.

the bankrupt could have done so by suffering
It is not necessary in the present case to
what would be the effect of a bargain and sa
by the commissioners after the death of th
in a case where, during his life, he had be
an estate tail.

BEST J. concurred.

Judgment for the

Tuesday,
January 29th.

DOE on the demise of ELIZABETH I
against VAUGHAN and WALKI

Where a tes-
tator bequeath-
ed a burgage
tenement to his
nephew, J. L.,
for life, and
from and after
his decease, to
all and every
the child and
children of J.
L. lawfully be-
gotten, or to be
begotten,
whether sons or
daughters,
they, if more
than one, to
take, as tenants
in common, in
equal shares and
proportions;
and for want of
such issue, to
his own right
heirs for ever:
Held, that un-
der this devise,
J. L. took only
an estate for
life, and that
after his death,
his children
took only es-
tates for life as
tenants in com-
mon.

EJECTMENT for a messuage and pre
the *Golden Lion Inn*, situate at *New*
Line, in the county of *Stafford*. At the
Park J. at the last *Lent* assizes for the county
a verdict was found for the lessor of the pl
ject to the opinion of the Court on the foll
Thomas Liversage being seised in fee of the
question, on the 6th *December*, 1788, made
which he devised a burgage tenement in
under-Line, to his brother *Joseph Liversage*
then he devised as follows: "I give and de
messuage, tenement or dwelling-house, sta
being in *Newcastle-under-Line* aforesaid, r
holding of *John Harrison*, with the brew
unto my brother, *Joseph Liversage*, and his
and during the term of his natural life, desir
be kind to his and my sister, *Mary Salmon*
and after his decease, I devise the said mess
gage tenement, or dwelling-house, with th

re given and devised by me, to my said
 for life, unto my nephew John Liversage
 for and during the term of his natural
 and after his decease, unto all, and every
 children of the said John Liversage, lawfully
 be begotten, whether sons or daughters,
 an one, to take as tenants in common, in
 proportions, and for want of such issue,
 heirs for ever. And I devise unto my
 John Liversage, his heirs and assigns for
 dwelling-house with the appurtenances,
 nure of Thomas Stretch. Also, I devise
 y, Robert Liversage, and his assigns, for and
 of his natural life, all that my messuage,
 ent or dwelling-house, in Newcastle-under-
 my holding, with the brewhouse, &c.
 immediately after his decease, I devise
 age, burgage tenement or dwelling-house,
 ts and appurtenances to the same be-
 all and every the child or children of the
 Liversage, lawfully begotten, whether sons
 they, if more than one, to take as tenants
 equal shares and proportions, and for
 issue, to my own right heirs for ever. And
 at one day-work, or reputed day-work
 nd, lying and being near Newcastle afore-
 tain common or town field, called the
 y said nephew, Robert Liversage, his heirs
 or ever." There were several other de-
 nial and real property in the will. The
 7th June, 1797, seised of the premises in
 out altering or revoking his will. Joseph
 in the life-time of the testator, on the

1822.

DOR dem.
 LIVERSAGE
 against
 VAUGHAN.

1828.

**DOE deems
EPA's rule
against
Vaporar**

29th June, 1791. At the time of the testator *Robert Liversage* was his heir at law, being the son of *Joseph*, the testator's brother. On the 17th of June, 1799, *Robert Liversage* made his will, duly executed, attested, and devised all his real estate in possession or remainder, to *Elizabeth Liversage*, the wife of the plaintiff, for life, with remainders over to his heirs. *Liversage* died 6th February, 1799, without altering his will. *John Liversage* entered into possession of the premises devised to him by the will of *Liversage*, and died in 1800, leaving two daughters, *Ann* and *Elizabeth*, him surviving. *Ann*, the eldest daughter, married the defendant; *Joseph Vaughan* is still living. *Elizabeth*, the youngest daughter, died a minor on the 26th July, 1810, leaving no husband and one child her surviving; this child died about a fortnight after. Upon her death, the premises were taken into possession by *Joseph Vaughan*, and his wife, took possession of the premises devised to *John Liversage*, and by deed of feoffment, bearing date 13th December, 1810, and fine with proclamations of Hilary term, 1811, conveyed the premises to one *Richard Richardson* and his heirs, such uses as *Joseph Vaughan* should by deed or will appoint: and in default thereof to *Joseph Vaughan* for life, afterwards to the use of *Alexander Oliver* and his heirs, during the life of *Vaughan*, in trust for the use and his assigns: remainder to the use of *Richard Richardson* and his heirs and assigns for ever. And afterwards by deeds of lease and release, dated 15th and 14th January, 1815, the release made between *Joseph Vaughan* and his wife of the one part, and *John Walker* of the other part, *Joseph Vaughan*, under the power contained in the deed of feoffment, as a security by way of mortgage.

premises to *John Walker* in fee, subject to
 n payment, &c., and a recovery was suffered
 es in *Michaelmas* term, 1815, to the use of
 for the better securing the money advanced.
 ant, *Walker*, was in the receipt of the
 of the premises under the above con-
Hilary term, 1815, *Vaughan* and his wife
 sur conuzance de droit come ceo, of the
 e last proclamation on which took place
 s term, 1815. The declaration in eject-
 delivered on the 19th *January*, 1821, and
 y of the demise laid in the declaration, and
 ne limited by law, the lessor of the plaintiff
 entry on the premises to avoid the fine.

or the lessors of the plaintiff. Under this
Liversage took only an estate for life, and
 b, his children took as tenants in common
 re is here no general intent to be found,
 particular intent in this clause of the will
 uted. The devise in this case is to *John*
 life, and from and after his decease, to all
 e child and children of *John Liversage*,
 tten or to be begotten, whether sons or
 Now it is clear, that by this only the im-
 of *J. Liversage* were meant, and not
 race to descend from him. In *Wild's*
 was devised in remainder to *R. W.* and
 after their decease to their children; and
 at the children took only an estate for life
 And *Goodwyn v. Goodwyn* (b) is to the

1822.

DOE dem.
 LIVERSAGE
 against
 VAUGHAN.

1822.

DOE dem.
LIVERRAGE
against
VAUGHAN.

same effect. The words "child or children" are before here words of purchase and not of limitation; they are further qualified by the words which "they, if more than one, to take as tenants in common in equal shares and proportions;" which words were much relied on in *Doe v. Jesson*. (a) And this case has since been overruled in the House of Lords on another ground, viz. that there the first being in terms of an estate tail, could not be converted by these subsequent words to an estate for life; here, the prior words are such as of themselves only give an estate for life, and the construction is therefore fortified by the subsequent clause which comes the words on which the other side rely, "want of such issue." But, "such issue" must be of reference to what has preceded, viz. child or children. The clause is therefore tantamount to, "and for the use of such child or children," which are manifestly not words to create an estate tail by implication. *Hayes v. Coventry* (b) and *Foster v. Earl of Romney* (c) are authorities on this point. Then, if only an estate for life was devised by the will, it is quite clear that there would have been a forfeiture of the estate by the fine which had been levied, *Com. Dig. tit. Forfeiture A.*

Puller, contra. It may be admitted, that if an estate for life only passed by the will to the children, and *Liverrage*, there was a forfeiture; but here, the question turns on the intention of the testator, to be gathered from the whole will. This was a devise of a tenement, and it can hardly be supposed that the

(a) 5 M. & S. 95.

(b) 3 T. R. 85.

(c) 11 E.

ne will had devised another burgage tene-
 ame way, to *Robert Liversage*, the heir at
 re intended, if *John Liversage* should die,
 e family, then, that on the death of each
 ortionate part of this tenement should go
 heir at law, who was already provided for.
 se was to persons not in esse at the time of
 under such circumstances, the word chil-
 many cases, been held to be co-extensive
 d to include remote descendants. *Cook v.*
Wild's case are authorities for this. In
 g (b) several cases are cited, to shew, that
 children" and "issue" have been some-
 d to create an estate tail. In *Moore*, 397.,
 to his son for life, and after his decease to
 ren of his body, was held to be an estate
 certificate of *Ashhurst* and *Buller J.*, in
rarrison (c), and the cases of *Seale v. Bar-*
Webber (e) are authorities to shew, that the
 ren," in a will, may include grandchildren,
 e remote descendants. Here, too, there are
 or want of such issue." In *Doe v. Reason*,
v. Holmes (f), *Ryder C. J.* laid it down,
 the word "issue" operates as effectually
 state tail, as the words "heirs of the body"
 ; and the observations of *Lawrence J.*, in
ron (g) and *Pierson v. Vickers* (h), are to the
 No case can be found, where, when the

1822.

DOE dem.
 LIVERSAGE
 against
 VAUGHAN.

mon, 545.
 R. 737.
 & A. 713.
 4, 51.

(b) 1 Vent, 225.
 (d) 2 Bos. & Pul. 485.
 (f) 3 Wilson, 245.
 (h) 5 East, 548.

word

1822.

Don dem.
Liversage
against
Vaughan.

word children, in a devise, under such circumstances followed by the word issue, it has not been sufficient to pass an estate tail. As to the words "and daughters," they can make no difference; they only mean, that an estate in tail general, and not special, should pass to the devisees. Taking, therefore, the whole of this devise together, the subsequent words "for want of such issue," shew, either that the words "child or children" are to be taken as words of limitation, and then *John Liversage* would take the estate in tail, or that they give to him an estate for life, and the remainder in tail to his children. It is true, that, according to this construction, the words "to take shares in common, in equal shares and proportions," would be rejected. But in *Pierson v. Vickers*, the words "tenants in common" were rejected, as being inconsistent with the general intent of the will; and so in *Applin (a)*, the words, "and amongst" were rejected for the same reason; and *Doe v. Smith (b)* and *Cooper (c)*, and *Doe v. Jesson*, in the House of Lords, are to the same effect. Here, therefore, in order to carry the general intent into effect, the will must be read thus: "To *John Liversage* for life; and for life after his decease, to all and every the child and children of *John Liversage*, whether sons or daughters, for want of such issue, then over." If so, it falls nearly within the words of *Hodges v. Middleton*, which is hardly distinguishable from this case. If there was a devise to *B.* for life, and at her death to her children; and in case of failure of children to the issue over; and the Court held, that either *B.* had an

(a) 4 T. R. 62.

(c) 1 East, 229.

(b) 7 T. R. 53.

(d) Doug. 431.

ate for life, with remainder in tail to her
ther, therefore, in this case, *John Liversage*
te tail or an estate for life, remainder in
ildren. In either event, there has been no
d the defendant is entitled to the judgment

1822.

Dor dem.
LIVERSAGE
against
VAUGHAN.

J. I am of opinion, that a life estate
under the will to the daughters of the tes-
w, *John Liversage*. It is very probable that
like many other persons unacquainted with
have thought that a real estate in fee simple
by the same words as would be sufficient to
estate interest in a case of personal property ;
he laboured under a mistake. In this will
words to be found, either connected with
intended to take, or with the thing devised,
the quantum of interest intended to be
the case of *Hodges v. Middleton*, the testator,
bequeathed "all his real estate in the parish
which shewed the quantum of interest in-
ss under the will ; but in this will there are
ds ; nor are there any words applied to the
objects of his bounty, to shew that they
e an estate of inheritance, as would be the
ords "heirs of the body" or "issue" had
The expressions in the will are "all and
ild and children of the said *John Liversage*,
otten or to be begotten, whether sons or
hey, if more than one, to take as tenants in
equal shares and proportions." I cannot
der these words, the testator meant to in-
children, or more remote descendants. Then
there

1822.

DOE dem.
LIVERSAGE
against
VAUGHAN.

there follow the words, "and for want of such my own right heirs;" but these words will not the estate previously given; for it appears, from the authority of *Hay v. Lord Coventry*, and the others cited, that the words "such issue," must refer to the previous words, "child or children." If, indeed, the word "such" had been omitted, it might have been contended, that, by implication, an estate tail was intended under the will. I am, therefore, of opinion, that in this case, the plaintiff is entitled to judgment.

HOLROYD J. (a) I am of opinion that by the words of *J. Liversage* took an estate for life, and that his heirs took only estates for life, as tenants in common. This is very distinguishable from those cases, where the words of the original limitation were sufficient of themselves to carry an estate tail, and where the only question was whether they could be controuled by the subsequent words of the will. There it has been held, that the general intention could not be carried into effect, without giving to those words their ordinary signification; and for this reason, the Court have rejected the other words, as being inconsistent with it. But here, there are no words to be found, unless the words "child and children" are to be considered as nomen collectivum. It is not admitted, that a devise to a man and his children, in some cases, give an estate tail, if it can be collected that such was the intention of the testator. But it is clear, in this will, that the testator did not use the words "child or children" in that sense, for he speaks of his sons as sons and daughters, which shews that he only contemplated the immediate descendants of *J. Liversage*.

(a) *Bayley J.* had left the court.

s them an estate as tenants in common. Nor
 rds "for want of such issue," carry the
 her; for they only refer to the words "child
 " I think, therefore, that neither expressly
 lication, did an estate tail pass by this will.

1822.

DOX dem.
 LIVERSAGE
 against
 VAUGHAN.

I am clearly of opinion, that under this
Liversage and his children took only estates for
 true, that in some cases, the word children
 en as equivalent to the word issue; and it
 ived in *Seale v. Barter*. But in that case, it
 e that Lord *Alvanley* gives the key to the de-
 a of the present case. There, the testator
 uthed all his lands and estates to his son *John*
 ildren, lawfully to be begotten; and Lord
 n giving judgment, says, "Now, we are of
 pon all the authorities, that the words chil-
 ally to be begotten, in this case are not to be
 as words of purchase, but that the intention
 ator was to give his estate to his son, and the
 s body generally." In this case, however, it
 at the words "child or children" are not to
 s words of limitation, but as words of pur-
 , by the will, they are to take, as tenants in
 in equal shares and proportions. The word
 as it seems to me, therefore, was intended by
 or to be confined to the immediate descendants
Liversage. If so, the case of *Hay v. Lord*
 s in point, and shews that the words "such
 st be confined to the previous words, "child
 n," and cannot carry the case further. I am
 of opinion, that the plaintiff is entitled to our

Judgment for the plaintiff.

1822.

*Tuesday,
January 29th.*

Cox and Others against TROY.

When a defendant, having once written his acceptance with the intention of accepting a bill, afterwards changes his mind, and before it is communicated to the holder, or the bill delivered back to him, obliterates his acceptance: Held, that he is not bound as acceptor.

ASSUMPSIT upon a bill of exchange dated 20th May, 1820, drawn by *Stephen T. Roch*, upon the defendant and *W. T. Robarts*, since deceased, by the names and firm of Messrs. *W. T. Robarts and Co. London*, payable 61 days after sight to *James Murphy*, and indorsed by him to the plaintiff, alleged to have been accepted by the defendant *Tierney Robarts*, payable at Messrs. *Robarts, Curtis and Co.* The first count stated these facts, and demanded payment when due, and refusal to pay by Messrs. *Robarts, Curtis, and Co.* The second count was on a general acceptance; and the third was stating that the bill was delivered to the defendant *W. T. Robarts*, to determine, within a reasonable time, whether or not they would accept the same; and that they promised to take due care of the same, and to return the same without defacing or spoiling it, which they did not do, but returned the same bill in a defective and injured state. The declaration also contained usual money counts. Plea, general issue. The case was tried at the sittings after *Trinity* term 1821, before *Abbott C. J.* when a verdict was found for the plaintiff subject to the following case. It was admitted in evidence, that the bill of exchange mentioned in the declaration was drawn by Messrs. *T. and J. Roch* on the defendant and *W. T. Robarts*, since deceased, as stated in the declaration, and that the same was duly indorsed by the plaintiffs by the payee. The plaintiffs in

bill from *Cork* on the 24th *May*, 1820; same day their clerk, by their directions, acceptance at the defendant's counting-house in *Old-street, London*, in the usual way. He kept it until *Saturday* the 27th *May*, upon which one of the defendant's clerks delivered back the bill of exchange to him without any observations at the time. The words "24 *May*, 1820, at Messrs. *Robarts, Curtis and Co., W. T. Robarts and Co.*" were written upon the bill by the defendant, or authorised by him, whilst the same was in the hands of the jury found by their verdict that the defendant and the said *W. T. Robarts* did accept the bill of exchange; but at the time the clerk received the bill of exchange to the clerk of the plaintiff on the 24th *May*, 1820, at Messrs. *Robarts, Curtis and Co., W. T. Robarts and Co.*" were inked upon the bill, so as with great difficulty to be deleted. The defendant did not offer any evidence for the obliteration of the acceptance. The acceptance was not obliterated, or any part of it rendered illegible.

the plaintiff. In this case the acceptance, once made, could not be revoked by the defendant. See *down* in *Marius*, p. 83. although that is dictum. But in *Molloy*, book 2. c. 10. s. 28. it is said that when a party has once subscribed, he cannot blot out his name. And the *Hamburgh* law says it down in general terms, that an acceptance once made cannot be revoked. *Trimmer v. Oddy*, *Stinck v. Dorrien (a)*, is an authority in point.

(a) 6 *East*, 200. *Chitty on Bills*, 160. S. C.

There

1822.

Cox
against
Taylor.

1822.

Cor
against
Theor.

There Lord *Kenyon* was of opinion, that to deface the bill, that makes him liable as acceptor in *Thornton v. Dick* (a) this point was explained by Lord *Ellenborough*. It seems also to have been considered as the law in *Bentinck v. Dorrien*, *Handley v. Glynn*, (b) And it is treated as the law in *France* at the present day by *Pardessus*, a French writer. (c) In *Adams v. Lindsell* (d), the defendant was held to be bound by the plaintiff's acceptance of the bill, although not communicated to him, and the jury have found that there was once an acceptance by the defendants, and that being so, they held the bill afterwards to revoke it.

Denman contra was stopped by the Court.

ABBOTT C. J. I am of opinion, that, in this case the defendant is entitled to judgment. It is true that the jury have found that he did accept the bill.

(a) 4 Esp. 270.

(b) 1 Compt. 428. n.

(c) The passage referred to is in the *Cours de Droit Commercial* de *M. Pardessus*, Paris, 1814, part 2. tit. 4. chap. 4. sect. 4. §. 1. The writer, speaking of the effect of an acceptance, says, "Elle est valable, et celui qui l'a donnée ne serait pas libre de la rayer, si elle n'est que le simple acquiescement de celui sur la présentation duquel la lettre aurait été payée, parce que l'acceptation n'oblige pas simplement l'accepteur, mais qu'elle forme également un contrat entre lui et le porteur; qu'elle forme également un contrat entre lui et le tiré. En ce sens le paragraphe du même auteur dit, "C'est la bonne foi qui doit être avant tout considérée, et que la seule fraude ne doit pas empêcher des opérations légitimes, le tiré ne peut précipitamment accepter, et vouloir rayer son acceptation, car la lettre qui en est revêtue circule, pourroit la rayer, et ainsi la date et l'existence de ce changement par un protêt, ou par tout autre semblable, qui ne permettroit pas de croire que jamais la lettre n'a été revêtue de l'acceptation non rayée."

(d) 1 B. & A. 681.

1822.

**Cox
against
Tack.**

Li

1892.

Cor
against
TAY.

case like the present, which depends on the
 chant, the opinions of learned lawyers and
 of foreign and commercial nations, though
 strictly speaking, be quoted as authorities
 entitled to very great weight and attention
 find, therefore, that it is laid down in *Poth*
 that a party who has given an acceptance
 before the bill goes out of his hands, it affords
 argument in support of the view which I
 question. I think the rule there laid down
 than the one contended for by the plaintiff
 perceive how the holder of a bill, or any
 party, is prejudiced by it; for it is to him
 thing, whether when the drawees give it
 deliver it to him unaccepted, or whether
 the drawees have withdrawn their acceptance
 at one time intended to accept it, but have
 quently changed their mind. Thinking, and
 no prejudice can arise to the holder, or
 parties to the bill, and that they are placed
 the same situation as if no acceptance were
 seems to me, that it was competent for the
 erase their acceptance before they delivered
 and therefore that the defendant is entitled to
 ment.

BAYLEY J. I am of the same opinion.
 the drawer requires the drawee to come under
 engagement to pay it when due. The question
 the drawee comes under an engagement, whether
 act of writing something on the bill, or by
 communicating what has been written to the
 I have no difficulty in saying, from principle
 mon sense, that it is not the mere act of writing

making a communication of what is so binds the acceptor; for the making the is a pledge by him to the party, and older to act upon it. But while it remains hands, it seems to me, the acceptance is on the person who signed it, and he is y, before he parts with it, "I have not to an engagement to accept."

I also think, that in this case the party to cancel his acceptance prior to the time was delivered back. In the old books there import that an acceptance once made ked. In some of them it is said, any thing s to an assent to pay the bill, whether in ewise, is in point of law an acceptance; it has been on that principle, that the case

Dick was determined; but the two subse- tem to shew that Lord *Ellenborough* had is former opinion. In *Fernandey v. Glynn* of the cheque was with the view and under t would actually be paid, and in that case it contended, either that the crossing or can- amounted to actual payment, so that an ey had and received would lie for the amount kers, or that if not, yet it was to be consi- ture of an acceptance. Now that case seems strongly to the present; for there, accord- ge, if a cheque was intended to be paid, it but if not, nothing was done, but it was re- parties from whom it was received. And ue in that case was cancelled, it was done ion of payment, and not really by mistake.

1822.

 Cox
 against
 Tayr.

1822.

Cox
against
Taylor.

In consequence, however, of the large payment in the course of the day, on account of the bankers changed their intention; the cheque was delivered back, and the original was considered bound to pay it. The opinion of *Pothier*, stated in *Raper v. Birkbeck*, is precise on the subject, and is far better authority than the passage from *Marius*. Where a man accepts a bill, and gives it out accepted, he must remain irrevocably bound. In contracts made between parties at a distance, a man writes his acceptance, and sends it out; he cannot revoke it afterwards. I am satisfied, however, that this is not a binding acceptance, having been cancelled anterior to the time the cheque was delivered back.

BEST J. This is a question on the law, and it is desirable, that that law should be ascertained, this as in every other commercial country. We are sitting here, to act according to the judgment of the courts in our own country, but in the absence of authorities, we may with great advantage consider the opinions of learned writers on the point. There seems to be no authority in the law, except the case of *Thornton v. Dick*. I say, my Lord C. J., that Lord *Ellenborough* seemed to have changed the opinion which he is reported to have delivered in that case. The passage in *Marius* is probably applicable to the case where the bill is delivered out, for it does not speak of cancellation or revocation. But the authority of *Pothier* is not in point. That is as high as can be had, and the decision of a court of justice in this country

known that he is a writer of acknowledged writings have been constantly referred to, and he is spoken of with great praise in *Jones* in his *Law of Bailments*, and his considered by that author equal in point of method, apposite examples, and a clear manly style of *Littleton* on the laws of this country. Therefore, have a better guide than *Pothier*. As to the opinion of *Pardessus*, I should regard him as rather speaking of bills delivered, and not erased. That seems to me per- from the next passage, where he says, that a man does accept a bill, still if he cancels that before he delivers it out, that is sufficient. Regarding this as a question merely of common judgment by analogy, is it not clear that a man is not bound in such a case as this? It is not that the defendants here ought to have done this was done by mistake. How is it possible that? The thing looks like a mistake. He has written an acceptance, and afterwards finding it written it, that it is on the wrong paper; refusing to accept that bill, he does that which was his intention not to enter into such a bill. Nobody can be injured by it. When the bill is put back it is in as good a state as it came. The defendant is placed in the same situation. It appears therefore, not only on authority, but on the basis of common sense, that the defendant was not bound by this as an acceptance, and that our judgment is in his favour.

Judgment for the defendant.

1822.

Cox
against
TROY.

1852.

**Thursday,
January 31st.**

Esperic HUGHES.

Where an attorney, in order to get possession of papers belonging to *A. B.*, in the hands of *A. B.*'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that *A. B.* should enter into an unqualified reference, not revocable, &c. : Held, that *A. B.* having become subsequently bankrupt for the second time, and without paying 15s. in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 G. 3. c. 121. s. 14. so as to dispense with the reference, and that the attorney was liable, pursuant to his undertaking, to procure *A. B.*'s signature to an agreement of reference, and to find security for the performance of the award to the satisfaction of the master,

SCARLETT, in *Easter* term, 1820, obtained a writ of *habeas corpus*, calling on *John Garnett*, an attorney, to shew cause why he should not be committed to prison, and procure *Hugh Emmett*, his client, to give an agreement of reference, and find security for satisfaction of the master for *Emmett's* performance. It appeared that *Emmett* had been in partnership at *Liverpool*, and being indebted to *Garnett*, who had formerly been his attorney, for business done by him, and there being a dispute as to the amount, a reference between them was ordered. At that time, *Hughes* having papers belonging to *Emmett* in his hands, of which *Garnett*, who was then his attorney, wanted to get possession, the latter wrote in writing, that *Emmett* should enter into an agreement of reference, as to the matter in dispute between *Hughes*, which reference was not to be made until *Emmett*, provided *Hughes* would give up possession of the papers. This was accordingly done. On shewing affidavits were ultimately referred to the master, who reported as follows: "I find that Mr. *Garnett* is bound under the guarantee given to Mr. *Hughes*, to procure that Mr. *Garnett* shall, before the first day of *February* next, procure Mr. *Emmett* to execute the agreement of reference as heretofore prepared, or execute security for the attorney of Mr. *Emmett*, and shall also, on the said first day of *February* next, find security for satisfaction for performance by the said *Emmett*, of the agreement of reference."

in pursuance thereof, unless the Court shall order, that Mr. *Garnett* is discharged from his estate on the following circumstances. Mr. *Hughes*, with the consent of Mr. *Garnett*, proved a debt of £1000, a second commission awarded against *Emett*, on the 11th September, 1820, and had a claim re-quested for a further sum against *Emett*'s separate estate. On the commission, Mr. *Hughes*, in his proof, executed an undertaking of Mr. *Garnett*. Mr. *Hughes* produced a proof of a debt of 249*l.* 15*s.* 3*d.* against *Emett* in partnership with one *Monkhouse*, also excepting *Emett* as guarantor of Mr. *Garnett*, but such proof was not accepted by Mr. *Garnett*, as solicitor to the commission, being a joint proof. The undertaking of Mr. *Hughes* was given after the date of the first, and before the second commission, and *Emett*, under the first commission, has not yet paid 15*s.* in the pound. No debt has been paid or offered to be paid by

1822.

Ex parte
HUGHES.

Mr. *Garnett* contended, that the proof under *Emett*'s commission was dispensed with the necessity of any reference to an election under the 49 G. 3. c. 13, and that, therefore, *Garnett* was not liable as guarantor. Here too, this was a second commission under which 15*s.* in the pound was not yet paid. Therefore, if *Hughes* had not proved under the first commission, *Garnett* might have brought an action against *Emett* for the money paid by him as surety, and in that action he might have made his future liability a defence, and he cited *Mead v. Braham*. (a)

(a) 3 M. & S. 91.

1822.

~~Ex parte~~
~~HUGHES.~~

Per Curiam. It was the duty of *Garnett* to pay the debt before the proof of *Hughes* under the act of bankruptcy, or at all events, to have given *Hughes* notice not to prove, if he thought that would be a disadvantage to himself. If, therefore, any inconvenience was done him in respect of the proof made by *Hughes*, his neglect was the cause of it. Here, *Hughes* was liable for his debtor and *Garnett* as the surety, and *Garnett* therefore had a full right to prove under *Emett's* commission. Besides, the legislature consider the proof made by the principal as a benefit to the surety, by releasing him pro tanto from the debt. The rule must therefore be made absolute.

Ru

Scarlett and *Parke* were to have supported

Thursday,
January 31st.

The KING against the Justices of No

Where an order of removal has been executed, and by consent of the removing parish and the magistrates making it, it is superseded, and the paupers taken back, it is in the discretion of the sessions to enter an appeal against it or not, according as they may think that

justice requires it, in order to compel the respondents to pay the costs of maintenance incurred by the appellants before the order was superseded.

COOPER, in last *Michaelmas* term, obtained a writ for a mandamus to the defendants, compelling them to enter continuances, and hear the appeal of the churchwardens and overseers of the parish of *Hautboys with Lammas*, in *Norfolk*, against the decision of two magistrates for removing *Hannah*, the wife of *Edward George*, (then a prisoner in the house of correction at *Aylsham* in that county, convicted of burglary) and her family from the parish of *Repps with Little Hautboys with Lammas*. It appeared

taken place on 22d *August* last, and that on
September following, notice of appeal was given.

October, a supersedeas, under the hands and
 removing magistrates, was served on the
 the appellant parish, stating, that doubts had
 inined whether the order could be supported
 dence, and requiring them to deliver up the
 der to be cancelled, and also requiring the
 to take back the pauper. It appeared, that
 ne at the instance of the respondents, the
 noval having been founded on the examin-
 ward *George*, taken under 59 G. 3. c. 12.
 hat, he being a prisoner convicted and under
 larceny, his examination was not evidence,
 not being an admissible witness until the
 of his sentence. It did not appear on the
 whether the costs of maintenance between
 and 10th *October*, had been paid or tendered
 pondents. On the 17th *October*, application
 o the sessions for leave to enter the appeal,
 refused, the Court being of opinion, that the
 completely at an end.

on shewed cause. It is obvious that this re-
 place under a mistaken construction of the
 12. s. 28., which must of course be confined
 inations of such persons in custody, as are
 spectis admissible witnesses. As soon as this
 s discovered, the order was superseded, and
Allebury (a) is an authority to shew, that, even
 ecution of an order of removal, the justices

1822.

The King
 against
 The Justices of
 Norfolk.

(a) 12 *East*, 359.

may,

1822.

—
The King
against
The Justices of
Norfolk.

may, with the consent of the respondents, and the consent of the appellants is not necessary. The only object of this motion is, to prevent a writ of mandamus from issuing, for the merits; for if the writ of mandamus is now issued, the respondents will be compelled to try the evidence of *George*, who, as soon as his imprisonment is over, will be a competent witness.

Cooper, contra, relied upon *Pantras v. The King*, as shewing the distinction, that, though the respondents may supersede an order before, they cannot do so after it is executed; besides, here the appellants have been compelled to provide for the paupers from the 10th of October up to the 10th of October; and if this be allowed, it will entail great hardship upon parishes, for juries may remove paupers immediately after one session, and supersede their order immediately before the next session. The objection that the merits cannot be tried, because *George* remains in prison, that is not important, for it is in the power of the sessions to respite him from time to time, until he becomes a competent witness.

BAYLEY J. This is a very different case from *Rambold*, which is only an authority to shew that justices having been surprised into making an order, may, of their own authority, and without the sanction of the removing parish, supersede it before execution, and not after. But in this case, there is the sanction of the removing parish. The language of Lord Eldon in *Rex v. Diddlebury*, puts it upon that view.

"there are two ways of getting rid of an
y consent of the parish in whose favour it is
ndon it, the other by appeal;" and he adds

"what objection can there be, as Lord
served, in the case of *Rex v. Llanrhydd*, to
ndoning a judgment intended for his own
These observations shew that the consent of
g parish alone is requisite. I think, that in
his, the sessions may exercise a discretion,
he appeal or not, so as best to answer the
justice. If the parties removing do not
the expenses of maintenance incurred, pre-
e supersedeas, they may then enter the ap-
purpose of compelling them so to do. If
ing to do it, the sessions may refuse to enter

Here the only object of entering it, would
to obtain a decision from the sessions, in the
material witness, or to respite the appeal
time. In the latter case there would be a
se entailed upon the parties. As soon as
is charged from prison, a new order may be
it is better for the appellants that it should
they will not be compelled to keep the family
n time. I think, therefore, that it was en-
discretion of the sessions to enter the appeal
I do not see any ground why this Court
refere with their decision. This rule must
e discharged.

The principle upon which this Court pro-
ducing the writ of mandamus is to prevent a
justice. Here the very reverse would be the
r we should either compel the sessions to hear
the

1822.

The KING
against
The Justices of
Norfolk.

1822.

The KING
against
The Justices of
Norfolk.

the case in the absence of the person who can give the most material information, or put the parties to a useless expence of obtaining respites from time till his imprisonment be over.

Rule discharged

(a) *Abbott C. J. and Holroyd J. had left the court.*

Friday,
February 1st.

The KING against LANE.

Where, in an application for a quo warranto against a constable, the affidavits in support of the rule stated, that for 50 years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial: Held that it was not sufficient,

J. WILLIAMS, in last *Michaelmas* term, obtained a rule nisi for a quo warranto against the defendant as constable of the township of *Failsworth*, in the county of *Lancaster*. The affidavits stated, that for 50 years and upwards, and as far back as the deponents could recollect, it had been the usual and established custom for the constable to be elected by the parish rates at a meeting for that purpose; and that, accordingly so held on the 3d *October* last, *Joseph Lane* was appointed; but that, notwithstanding, the defendant, stéward of the court-leet of the wapentake of *Failsworth*, had sworn in the defendant as constable for the year. But none of the deponents expressly stated, that they believed there had been immemorially such a custom in the town.

Cross Serjt. and Tindal were about to have moved for the discharge of the rule, when the Court called upon *J. Williams* to answer the preliminary objection, that no immemorial custom was stated in the affidavits. He contended that

Facts were there stated from which a jury
narily draw that conclusion: and that such
ated in this case.

1822.

—
The KING
against
LANE.

m. It is necessary on the face of the affi-
te, that there is, as the witnesses believe, an
custom to elect in this way; and it is not
ate facts from whence the conclusion may
or it may be consistent with these affidavits
arties making them may know when the
minated. In the case of *Rex v. Standard*
hich was an application to have overseers
r a vill, it was held to be necessary to swear
at it was a vill by reputation. (b)

Rule discharged.

378.

(b) See *Rex v. Williamson*, 3 B. & A. 582.

nd Another, Assignees of WELSH, a Friday,
pt, against HIPKINS and GREGORY. February 1st.

th of June, 1812, while the defendant Gre-
as abroad, a writ of special *capias*, at the
plaintiffs, issued against the two defendants,
ers, returnable on the morrow of *All Souls*,
r bail for 1000*l*. On the 11th of *December*,
ias special *capias* issued, returnable in fifteen
Martin in *Michaelmas* term, 1812, and a
turnable in eight days of *St. Hilary*, 1813.
ed in *September*, 1813. On the 17th *March*,
plaintiffs struck a docket against *Gregory*, and

In order to
save the statute
of limitations,
it is sufficient
that the writ be
sued out, and
the return
thereon in-
dorsed upon it
in time. It is
not necessary
that the writ
should be de-
livered out of
the sheriff's
office as re-
turned.

he

502
341
330
21

1822.

TAYLOR
against
HUPKINS.

he was declared a bankrupt, but having received a discharge from the commission, the Vice-Chancellor made an order that he should be at liberty to try its validity in a writ of habeas corpus. A writ of habeas corpus was granted, and the writ was returned by the sheriff. The writ was brought against the assignees. *Gregory* proved that he was in *England* in *April* 1821. His counsel insisted, that there was no valid assignment of the creditor's debt, inasmuch as it was barred by the Statute of Limitations; but the jury found a verdict against the assignees. Copies of the several writs, with the continuances, were given in evidence on the part of the plaintiff. The point was reserved as to the legal effect of those writs. It was stated in the affidavits, on the part of *Gregory*, that these writs were not delivered to the secondary's office before the 19th *March*, 1821, but were all filed together on the last day of *Term* 1821, in the King's Bench treasury, and a roll of the writs, with the continuances on the writ of habeas corpus, was carried in and docketed on the 11th of *July*, 1821. It appeared now, upon the affidavits produced on the part of the plaintiffs, that the writs were left at the secondary's office, between the beginning of *Michaelmas* term, 1812, and end of *Hilary* term, 1813, for the writs being returned by the then sheriffs; and that at the end of that term, a return was indorsed, that the writs of the defendants was to be found in the treasury. *Campbell*, on behalf of the defendant, *Gregory*, in *Michaelmas* term, obtained a rule nisi for setting aside the return to the special *capias*, alias and pluries, in this case, for irregularity, with costs. The Court, on the application of *W. E. Taunton* against the rule, and *Campbell* in support of it, ordered it to be returned to the Master, to enquire, whether, according

the Court, these writs had been duly returned as to save the statute of limitations; and the judge now reported that they had been duly returned for that purpose,

1822.

TAYLOR
against
HIPKINS.

Now excepted to the report, and contended, that the writs were not duly returned by having a return made on it, but by being delivered out of the Court as returned. Here, therefore, no rule made till 19th *March*, 1821, a period after the limitations had actually run. In this case, then, the writ was struck, the petitioning creditor's remedy barred by the statute, and the validity of the writs to be made subsequently to depend upon the conduct of the under-sheriff, in delivering or refusing to deliver the writs; it being clearly in his power, that the writs have been six months out of office, to make any return to the writs. In *Harris v.* it was held, that, in order to save the limitations, it was necessary to shew, not only that the writ was sued out in time, but also that it was

however, thought, that there was no good reason for altering the established practice, which was, to make such returns as regular, and the rule was

Rule discharged.

(a) 6 T. R. 617.

of acres, under the settlement, and also in the same parish, of which he was seized made his will, and devised as follows: "unto *Mary*, my wife, all my freehold and lands, of which I am now in the possession, lying in the several parishes of *Fordham*, in the county of *Cambridge*, my reversionary estate, expectant on *Mary Nethercote*, my mother, of and in freehold and copyhold messuages, lands, in *Solam* and *Fordham* aforesaid; to hold the said and copyhold premises unto my wife, for her life, (charged as in the will mentioned after the decease of my wife, then I devise the said and copyhold messuages, lands, &c., unto, *Mary Nethercote*, her heirs and assigns. And all other my real and personal estate, the payment of my funeral expenses and just debts and bequeath unto my said wife, her heirs, and administrators."

He died soon after making his will, leaving *Nethercote*, his widow, and *Mary Nethercote*, his daughter and only child, him surviving. *Mary*, who survived the mother, afterwards married *Chatteris*, and died in 1790, leaving issue only, viz. *Mary*, afterwards the wife of *Young*. Upon the death of her mother, *Mary* entered into the possession of the freehold and continued seized thereof till her death. The lands descended to Mrs. *Young* from *Mary*, and she was admitted thereto in fee simple. According to the custom of the manor of *Millenham*, after marriage, she made her will, bearing

K k

date

1692.

Dec dem.
Nethercote
against
BARTON.

1817

Don dem
 Petitioner
 against
 Estate

date the 29th of January, 1817, by which
 consent of her husband, testified by his signature,
 she devised all her copyhold lands in the manor of
Mildenhall, to which she had been admitted (with
 the copyhold lands in question) to *William*
Young and his heirs, for ever, and in case
 under age, then to her husband and his heirs
 for ever. The will was signed both by *Mrs.*
Young, in the presence of, and attested by
 witnesses, but there was no surrender passed
 under *Mrs. Young's* will. In the manor of *Mild-*
enhall is a custom enabling a feme covert to pass
 copyhold lands which have been surrendered
 by use of the wife's will, by the husband and
 wife being examined by the steward, separately
 from the husband, and consenting. The
 plaintiff is the heir at law, ex parte materne
 of *Young* on the part of her grandfather, but
 on the part of her grandmother, and the heir, according
 to the custom of the manor of *Mildenhall*, of
 the manor of *Nethercote*. The question for the opinion of the Court
 was, whether the six and a half acres of freehold, was, whether
 included in the particular devise in the will of
Nethercote, and passed under that devise to
 the plaintiff for life, and after her decease to his daughter,
 as to the copyholds, whether by virtue of the
 54 Geo. 3. c. 192, the will of *Mrs. Young*
 was sufficient to pass them, though there had been no
 surrender passed, and the use thereof.

Biggs Andrews, for the lessor of the plaintiff,
 the freehold land passed, under the particular
 devise in the will, to the wife for life, and after her death

fee; and consequently the lessor of the
 heir-at-law of Mrs. Young, is entitled to
 the question is not between the devisee and
 between two devisees. By the particular
 testator devises the lands of which he is in
 possession. Now he was in the immediate
 the freehold land in question, and conse-
 can be no doubt that this land would pass
 use, had it not been that the wife took the
 and the daughter nearly the same interest
 settlement. That circumstance, however, is
 to shew, that the testator intended this
 use, where the words of the particular clause
 unambiguous. Besides, there is no incon-
 sistent between the settlement and the will, for the
 he full control over the fee, with the ex-
 life estate to his wife, and he might there-
 suppose, that he might devise it, subject
 as he pleased. The will, as far as it
 only interest which was not in the testator,
 of the settlement. It is clear, that these
 not have passed by a devise of "All the
 which the testator was *not* in the possession."
 they must pass by the devise in this will,
 lands of which he *was* in the possession."
 as to the copyhold premises, depends
 G. 3. c. 192. The preamble of that sta-
 that by the custom of certain manors;
 of such manors passed by the last will
 of the copyhold tenants thereof, declaring
 surrenders made for that purpose, and that
 convenience had arisen from the necessity of
 surrenders; and then it enacts, that where

1822.

Doc dem.
 Nethercock
 against
 Barts.

1822.

—
 DOR DEM.
 NETHERCOTE
 against
 BARTLE.

any copyhold tenant of such manor may dispose of his copyhold tenements, the same surrendered to such uses as should be decreed by the court, will, every disposition made by such will be as valid and effectual to all intents and purposes as if no surrender shall have been made to the use of the will of such person, as the same would have been if no surrender had been made." The legislature has been obliged to supply a surrender which the person would have made, but which, through inadvertence or ignorance, had been omitted. It did not give to individuals powers over their estate which they did not possess before; now, it is part of the law, that a feme covert shall not make a disposition of her real property but under the regulations. First, She cannot dispose of it without the concurrence of her husband, for a fine cannot be levied on a married woman, described as such, is altogether void. Secondly, the law has provided, that she cannot be controlled by her husband to make an improper disposition of her property against her own interest; therefore the wife must be examined apart from her husband, in order to give effect to any transaction of her property. A feme covert, therefore, cannot alien freehold property, except by a matter of record, and her husband must be a party, and she cannot be a party to it, until she has been previously examined apart from her husband. If the construction contended for by the defendant is to be put upon this statute, a feme covert may dispose of copyholds by an instrument in writing, made either without the concurrence of her husband, or induced by his threats or control. The legislature never could have intended to have made such a disposition.

between freehold and copyhold property. It does not say, that the consent of the husband, examination of the wife shall be supplied, or that the surrender shall be supplied. Here, in passing of the act, both these things were given effect to the will, and therefore, unless within the statute, the will cannot operate on copyhold property. The third section of the act is quite conclusive upon this point, for it states that nothing therein contained shall be considered valid or effectual any devise or disposition of copyhold lands, &c. which would be effectual, if a surrender had been made to the will of a person attempting to dispose of a will." Now, in this case the feme sole was not by a mere surrender, without the consent of her husband, and without a previous surrender, have made an effectual devise of copyhold land. Therefore this will is not rendered valid by

1822.

DOE dem.
NETHERCOTE
against
BARTLE.

ra. The reversion of the settled property passes under the particular devise to the wife, but to the wife of the testator under the residuary clause; and if that be so, the lessor of the wife who is not the heir at law of the wife of the testator is not entitled to recover. The words, "of the wife in the immediate possession," are a declaration of the interest which the testator had in the land to be devised by him, and do not refer to the occupation or possession of the land under the will.

The words of a will must be construed according to their sense, unless a contrary intent plainly

1822.

Hos. dem.
NETHACOTEGUTHRIE
BARTLE.

appear, *Holloway v. Holloway* (a), and the testator, prima facie, be presumed to know the law. In another, *Parefoy v. Rogers*: (b) If there be no ambiguity in the words themselves, it is not to be altered by other words of the sentence, for the testator, in giving the lands of which he was in immediate possession, devised a reversionary estate expectant on the death of his mother, to his wife for life, and to his daughter in fee. Now, in the legal sense of these words, the reversion was not in the immediate possession of the testator; it was vested in interest, but not in possession. Estates in possession are here put in direct contrast to estates in reversion by the testator. It is clear, therefore, that the testator did not intend that the reversion should pass by this clause, and if he intended it, he would have devised it in express terms. By this construction, full effect will be given to the words of the will. The testator had, besides the property in question, other lands in the same parish, in which he was seised in fee. Of that he was, in every sense, in immediate possession, and that land alone, he intended to devise to his wife for life, and to his daughter in fee. But if the construction contended for on the other side should prevail, then the testator must be taken to have devised to his wife the same estate in that land which he possessed under the settlement, viz: a life estate. It is clear, that the reversion passed by the clause, *Chester v. Chester* (c), *Doe decd. Lord v. Weatherby*. (d) Besides, if the residuary clause is to operate upon this reversion, there is no other land to which it can operate. Then as to the copy-

(a) 5 Ves. jun. 401. (b) 2 Saund.

(c) 3 Pore W. 32.

(d) 11 East,

ish the want of a surrender is supplied by
 c. 192. The words of the first section are
 d comprehensive, and are clearly sufficient
 he present case. In *Taylor v. Phillips* (a),
 ed whether a surrender by a wife in her
 ence was not good, although it did not
 ha was separately examined. In this case
 signed, and was a party to the will; and
 essary that the wife should be examined,
 ure matter of form. The surrender and
 ot concurrent acts. The surrender may
 s prior to the will, yet the examination
 ce prior to the surrender, and the steward
 hing of the will which is not in existence.
 nder passes no interest at the time, and is
 t from a surrender of one to the use of
 on, which takes effect immediately, and
 aked. In the latter case, the examination
 substance, for a wife, under the influence
 d, might otherwise sell her estate during
 deprive herself of support during widow-
 surrenders, however, are not affected by
 But in this case, nothing passes during
 only exercises a power with the consent of
 which she herself possessed before mar-
 just proprietatis after the marriage is in her,
 possessionis in her husband, and they are
 to the appointment. Before the 55 Geo. 2,
 ent applications were made to courts of
 ply surrenders, and great litigation followed,
 et of the act was to remedy this incon-

1822.

Doz dem.
Narrator
against
Barr

(a) 1 Ves. 229.

1832.

Does not
Necessitate
any
Particular

reversion, by making one general and unap-
plicable to surrenders in all testamentary
the words of this act are sufficiently large to
bestow it on all such cases. Lord
Brougham, in reply, was desired by the
solicitor to the first point. The defendant
assisted by taking the words "of which
immediate possession," to refer to the
the testator had in the lands, and not to the
occupation. The testator was in the enjoy-
ment of an estate for life in the lands, and
therefore be included in the words of the
clause, even under that interpretation. An
argument is furnished for the defendant,
testator's having given another reversionary
express terms, because whether this reversion
the particular or the residuary clause, it
to have passed by a devise of the lands. It
is true, that if these lands did not pass
particular, they passed by the residuary clause.
The words of the particular clause are suffi-
ciently comprehensive to pass them, and it cannot be shown
that the testator meant not to include them in that
clause.

3. ABBOTT C. J. I am of opinion that
the plaintiff is entitled to recover both the freehold and copy-
hold lands. The question, as it regards the freehold,
depends entirely upon the construction of the will;
the question, as it regards the copyhold, depends upon
general and extensive importance. The particular
particular clause in the will are these: "I give, devise, and bequeath
Mary, my wife, all those my freehold and copyhold
lands, &c., of which I am now in the enjoyment."

1822.

Do not
think
that
the
will
is
not
valid.

in the several parts of the will, and
am quite satisfied that these words are
capable to comprise the freehold land in
here could have been no doubt indeed
if the person designated to take had
been a person who would have taken under
it appears to me, however, that the words
do not receive a different construction,
the character of the person to whom the
land is given is no means clear, that the testator
by the freehold land by the residuary
being so; I think that we are bound
to the clear and unambiguous words of the
will. As to the copyhold, I agree with the
defendant, that the words of the 55 G. 3.
are enough to comprise the present case;
it thence necessarily follow that the statute
in this case. It is laid down by Lord Coke (a),
that out of the mischief intended to be re-
medied, the statute shall be construed to be out of the
mischief. Now I am
satisfied that this case is out of the mischief in-
tended. The statute recites, that, by
certain manors, copyhold estates of such
by the will of copyhold tenants thereof,
uses of surrenders made for that purpose,
inconvenience had arisen from the
making such surrenders, the enactment
to prevent that inconvenience, which had
arisen from the necessity of making such
surrenders, and the inconvenience had been removed
by the will of those freehold
land, &c. of which persons the in-
convenience

1822.

Don Don
Nathaniel
agreed
Barton

arise from the necessity of making a surrender to give effect to the will of a married woman was a part of the custom of the manor that be examined by the steward. The inconvenience contemplated by the statute, was the necessity of an adult, not under any legal incapacity, to render a devise by him of copyhold effect. In the latter case, the surrender is mere matter of ceremony. Here, the surrender is matter of substance. I am of opinion, that the legislature intended the statute to supply the want of a mere form only. If we were to hold that the statute applied to a case like the present, we should be introducing of remedying a mischief; for I consider the examination of the wife, at the time of the surrender to the steward, according to the custom of the manor, as a guard and protection which the law has provided to prevent the wife from making an impudent disposition of the control of her husband. That protection is perhaps, so necessary in the case of a will as to be of an immediate sale. In the latter case, the wife deprives herself of all present and future means of subsistence; but although that is not so in the case of a surrender, she is still entitled to that protection which the law has allowed her, to prevent her being compelled by her husband to make an improvident disposition of his property in favour of himself or those connected with him. I think that if we were to put the construction put on this statute, we should deprive females of that protection which the law generally extends to with respect to their freehold property, and the custom of this and most other manors, has allowed them with respect to their copyhold

of opinion, that although this is a case
 words of the statute, it is not within the mis-
 ed to be remedied, and therefore is out of.

1822.

Don dem.
 Nethercomb
 against
 Basset.

To entitle a devisee to specific property,
 ent upon him to shew that there are, in the
 sufficiently large to pass that property.
 is the case the property will pass, unless a
 ention appears from other parts of the will.
 in the first instance, on the devisee, but
 is made out that the words are sufficiently
 the property, the onus is shifted, and cast
 site party. In this case, the testator devises
 old and copyhold lands of which he was in
 ate possession. At the time of making his
 in the immediate possession of certain lands,
 was seized in fee simple, and of certain other
 which he was seized for life, with reversion to
 ee, expectant on his mother's death; he has
 ed words sufficiently large to include the
 question, unless it can be collected from
 of the will, that he intended that the pro-
 d not pass; and it has been contended that
 ss, upon two grounds, first, because the will
 be inoperative as to the settled property,
 gives the property to his wife for life, with
 o his daughter in fee, and, independently of
 e wife had, in the settled property, an estate
 the daughter an estate in tail; and in case
 issue, that she would take the reversion in
 ent. There are many instances, however, in
 ator has devised settled property to a per-
 son

1822.

~~Don dem.~~
 NUNNACOTE
 against
 BARTLE.

son entitled to take under the settlement, has been cited in which that circumstance held to prevent the devise taking effect, where the portions are sufficiently large to comprehend the property, there being no authority upon the subject which ought not so to hold in this case. Then, as to the residuary clause, it seems to me, that the testator intended that clause contemplate the property in question, and uses general words for the purpose of passing the property. In the early part of the will, he devised specifically a reversionary interest which he held on the death of his mother, and if he had intended the residuary clause to pass specific property, he would have used a specific description. The use of the general words in the residuary clause does not satisfy my mind that the testator then contemplated the property in question. If there had been no residuary clause, the property in question would have passed by the particular devise. I know of no instance in which the general words in a residuary clause have been held to control the operation of a preceding particular devise. On the other question, I have no doubt whether the enacting part of the statute contains large words, but the recital refers to the particular inconvenience intended to be remedied. That it was, that a will expressly devising copyhold land was operative where the testator had omitted to surrender to the uses of his will. The surrender in this case was a mere matter of form, and I am of opinion that the statute meant to supply the want of surrender in such cases only, and not where it was a matter of substance. Here the surrender, coupled

mination of the wife, is a matter of sub-
quite satisfied that the legislature did not
away that protection which such a sur-
culated to afford to feme coverts. It is the
stewards of the manors in such cases to
t no feme covert is suffered to surrender an
uses of a will without previously apprising
consequences of that act. For these rea-
of opinion that the lessor of the plaintiff is
recover both the freehold and copyhold

J. It appears to me that the testator in
had in contemplation, not only lands of
in possession, but likewise lands of which
in possession; and he there makes use of
able to both. The lands of which he was
possession were one acre, (with respect to
is no question,) and six acres and a half of
which he was seised for life, with remainder
for life, with remainder in special tail, and the
to himself. He had besides land of which
the immediate possession, namely, that which
to him after the death of his mother; and,
in his consideration, he gives all the lands
was in the immediate possession, and also the
nt on her death, to his wife for life, with re-
his daughter, *Mary Nethercote*, her heirs and
ever. Now, the words are sufficiently large
and both. I apprehend it to be a clear
law, that where words are unequivocal, and
reprehend a particular species of property,
to be narrowed and restrained by mere
conjecture.

1822.

DOE dem.
NETHERCOTE
against
BAXTER.

1822.

Dec dem.
Newman
against
Barnes.

conjecture. I am therefore of opinion, that acres and a half are included in the devise which he was in the immediate possession. In respect to the other point, it seems to me that the statute only meant to do away with the necessity of making a surrender, which was mere matter of form. Assuming the words of the enacting part of the statute to be sufficiently large to comprehend a lease of this kind, they must still be construed with reference to the mischief intended to be guarded against. The chief was the necessity of making a mere surrender. Now, if before the statute, the wife had taken a formal surrender without examining the title apart from her husband, nothing would have been required under the will. I am of opinion that the statute supplies the surrender, and not that examination of the title which, by the custom of this manor, was necessary previously to the passing of the surrender. I am quite satisfied that the legislature did not intend to deprive married women of that substantial protection which, by the custom of this and other manors, was extended to them in cases of copyhold, and which is analogous to the protection allowed them by the Statute in England in cases of freehold property. For these reasons, I am of opinion that the lessor of the wife is entitled to the judgment of the Court.

DEAR J. concurred.

Judgment for the

1822,

Executor of QUINLAN against C. M.

BULTELL.

UPON a deed, whereby the parties submitted certain differences to the award

The first count of the declaration stated the defendant's covenant to obey, abide by, and perform an award, and that he would not by affected delay, or hinder, or prevent the arbitrators from making their award. It then stated, that the arbitrators duly made their award, and that they thereby directed, that the plaintiff should pay to the plaintiff certain sums of money. The breaches assigned were, that the defendant did not pay those sums of money. The declaration was founded upon the same deed, and alleged as a breach, that the defendant did, before the award, hinder and prevent the arbitrators from making their award in this, that the defendant, by a certain deed in writing, signed and sealed with the defendant, after reciting as therein was recited, did revoke the authority of the arbitrators, and put an end to, and determine the arbitration or arbitrations, reference or references, deed or deeds of submission, and that he had been guilty of the same.

It then stated, that the arbitrators duly made their award, and that they thereby directed, that the plaintiff should pay to the plaintiff certain sums of money. The breaches assigned were, that the defendant did not pay those sums of money. The declaration was founded upon the same deed, and alleged as a breach, that the defendant did, before the award, hinder and prevent the arbitrators from making their award in this, that the defendant, by a certain deed in writing, signed and sealed with the defendant, after reciting as therein was recited, did revoke the authority of the arbitrators, and put an end to, and determine the arbitration or arbitrations, reference or references, deed or deeds of submission, and that he had been guilty of the same.

entitled to judgment, although it appeared by the plea, that he had been guilty of the same. The plaintiff being entitled to recover damages only in respect of the cause of action disclosed in the declaration, and not in respect of a cause of action disclosed in the

first count of the declaration stated the deed of reference, and then averred that before the making of the award, hinder and prevent the arbitrators from making their award in this, that the defendant, by a certain deed in writing, signed and sealed with the defendant, after reciting as therein was recited, did revoke the authority of the arbitrators, and put an end to, and determine the arbitration or arbitrations, reference or references, deed or deeds of submission, and that he had been guilty of the same.

Declaration stated that defendant covenanted to obey, abide by, and perform an award, and that he would not prevent the arbitrators from making their award. It then stated that the arbitrators made their award, and thereby directed the defendant to pay a certain sum therein mentioned; and alleged as a breach of the covenant that the defendant did not pay the sum awarded. Plea, that before the award, defendant, by deed, revoked the authority of the arbitrators, of which revocation they had notice: Held, upon demurrer, that

agreement

1822.

MARR
against
BULFELL

agreement or agreements, contract or contracts to the arbitration or award of the said arbitrators, whereby they, the said arbitrators, were hindered and prevented from making their said award, the said plaintiff lost, and was deprived of that he would otherwise have derived from the said award. The defendant pleaded to the first count, that the arbitrators made their award, he, the defendant, revoked their authority, of which declaration the revocation of their authority, the arbitrators' making of the award in the first count mentions no notice. To this plea the plaintiff demurred. The defendant demurred to the second count of the declaration, and assigned for cause, that it was not admissible, that the arbitrators had notice of the revocation, and shewn how the defendant hindered them from making their award.

Chitty, for the plaintiff. The plaintiff is entitled to judgment on the demurrer to the plea to the second count. The ground of action stated in that count, is the breach of the covenant to perform the award. The defendant pleads the award to be void, but admits that the defendant committed a breach of another covenant set out in the declaration, by which the parties covenant to prevent the arbitrators from making their award. In *Charnley v. Winstanley* (a), this Court refused to give judgment in an action brought upon an award, where one of the parties to the award had become a feme covert subsequently to the making of the award, and before the award: the breach alleged in the

(a) 5 East, 266.

non-payment of money pursuant to the ground, that it appeared upon the whole one of the parties had been guilty of a breach, not to abide by the award, *Le Bret* (a). Now, here it appears by the defendant he has broken that covenant by revoking the authority, and therefore that case is examined. Secondly, the plaintiff is entitled to the last count. For there an actual revocation of the arbitrators is alleged, and proved. In *Vynior's* case (b), which was an action on the defendant's covenant of the condition, to abide the award of Mr. *Rugge*, and then by his deed "revoked and abrogated the authority of the arbitrator," to which the plaintiff proved it was resolved, that the plaintiff need not show that the arbitrator had notice of the counter-award, as it is implied in these words, "revocavit omnem auctoritatem," for without notice of revocation or abrogation of the authority, if there was no notice, it should be good for the defendant, as if a man pleads quod non, et dimittit pro termino vitae, it implies without livery, it is no feoffment gift or conveyance, that is an authority expressly in point, and the last count is properly framed.

Contra. The plea is a good answer to the action alleged in the first count, which is substitution of the money awarded. The award is wholly void. If the argument

1822.

MAIR
against
BUTTS.

1822.

MARSH
against
BULFREL.

on the part of the plaintiff is to prevail, he has the same advantage from this action as if the deed had been good. At any rate, that would be the case if the plaintiff had declared in debt upon the award. In that case he would have been entitled to recover the sum awarded. (The Court then desired to return to the other point.) The plaintiff ought to have said in the last count, that the arbitrators had made a deed of revocation. The allegation is, that the defendant, by a deed signed and sealed by him, did revoke therein what was therein recited, did revoke. The plaintiff merely states the legal effect of the deed, and the mere execution of such a deed, which does not revoke the authority of the arbitrators, would not be good as a revocation without express notice, and the second count is bad.

ABBOTT C. J. I am of opinion, that the plaintiff is entitled to judgment upon the demurrer to the first count of the declaration. The first count in the complaint in that count is the non-payment of the award pursuant to the award, or in other words the breach of the covenant to perform the award when made. It appears by the plea, that the defendant, by his plea, denying the authority of the arbitrators, has been negligent in not to abide by the award, or that where he has not to hinder the arbitrators from making the award, and it is urged on the part of the plaintiff that this plea is an answer to the cause of action in this count, yet that, inasmuch as it appears from the whole record that the defendant has made a breach of covenant, the plaintiff is entitled to judgment upon that count, and the case of *Charnock*.

en relied upon. That case, however, is shable from the present. There it ap- the face of the plaintiff's count, that the ade after one of the parties to the sub- becomes a feme covert. Her marriage was ocation of the authority of the arbitrators, was a breach of the covenant to abide by this case, the breach of that covenant is by the defendant's plea, and it never, has a plaintiff who seeks to recover damages for action stated in his count, is entitled to spect of another disclosed by the defend- am of opinion, that a plaintiff can re- spect of the ground of action stated in n. As to the demurrer to the last count, ugnish this from *Vynior's* case. There the, that the party by his deed revoked the he arbitrator, and the decision was, that imported notice to have been given to and that being so, the case is expressly the present. If the declaration in this ed, that the party had sealed and delivered, containing therein as follows, and setting and thereby revoked the authority of the would not have been sufficient, for that ve been an allegation of the effect of the the allegation is, that there was an express deal.

It is laid down by Lord Coke in *Vynior's* there is a difference when two things

(a) 5 East, 266.

1822.

 MARTIN
 against
 BULLOCK.

1822.

MARSH
against
BULTELL

are requisite to the performance of an a
things are to be done by one and the same
the case of feoffment, gift, demise, rev
and when two things are requisite to be
several persons, as in the case of a grant a
attornment is not implied in it; and
attornment the grant hath not perfection
much as the grant is made by one, and th
is to be made by another, it is not implied
ing of the grant of one; but, in the oth
things are to be done by one and the same
that makes the difference." Now, here th
that the defendant by deed revoked the a
that is a double allegation, importing,
party executed a deed of revocation, an
that he gave notice to the arbitrators.
therefore, may put in issue, either the ex
deed, or the fact of notice. I think, t
Vynior's case is an express authority to s
last count of the declaration is properly
for the reasons given by my Lord Chief
also of opinion, that the defendant is enti
ment on the demurrer to the plea to the fi

HOLROYD J. I am of opinion that the
entitled to judgment upon the demurrer to
This case is very distinguishable from *Ch*
stanley for the reasons already given by m
Justice; and I think that the plaintiff,
declaration, seeks to recover damages for
action therein stated, ought not to be allow
in respect of another cause of action, dis
defendant's plea. As to the demurrer to t

an authority to shew that it is sufficient
the party by deed revoked the authority
ly averring that notice of revocation was
bitrators, and that being so, the judg-
for the plaintiff upon that count.

for the defendant upon the demurrer to
to the first count, and judgment for the
upon the demurrer to the last count. (a)

(a) *Best J.* was absent at Chambers.

ONEFIELD *against* ARCHER.

Monday,
February 4th.

Michaelmas term last, obtained a rule nisi
the defendant's costs under 43 G. 3. c. 46.
F having held the defendant to bail without
or probable cause. It appeared upon the
the plaintiff, in *September*, 1817, entered
adant's service under a verbal contract,
he claimed, as due from the defendant, a
d upwards. Against this demand, how-
adant had a set off, which was proved.
r appeared, that on the 8th *July*, 1820,
of 2*l.* 19*s.* 8½*d.*, as the balance due, was
ntiff refused to receive it, claiming as the
due to him, the sum of 6*l.* 19*s.* 8½*d.* only,
of opinion at the trial, that this was the
and thereupon found a verdict for the
ges 4*l.*, in addition to the sum tendered.
July, the defendant was held to bail in the
d upwards.

Where, in the
account be-
tween plain-
tiff and defend-
ant, there are
items clearly
due on both
sides, it is an
arrest without
reasonable and
probable cause
within 43 G. 3.
c. 46. s. 3. if the
plaintiff arrests
and holds the
defendant to
bail for the
amount due to
him without, at
the same time,
giving him
credit for the
items clearly
due on the
other side of
the account.
He ought only
to hold the de-
fendant to bail
for the admitted
balance.

1892.

DAONEFIELD
against
ARCHER.

D. N. Jones shewed cause, and contended that there was a reasonable and probable cause for the arrest, the amount due from the defendant being 15*l.* As to the set off, it was not material. The statutes of set off are not compulsory, and he could not be certain whether the defendant had a set off off the debt due to him. In *Brown v. Brown* was held, that where a party who owed a debt and had a debt of 10*l.* due to him, arrested a party for 10*l.*, although upon the balance whatever was due to him, no action could be brought for a malicious arrest.

Tindal contra was stopped by the Court.

Per Curiam. It is an arrest without probable cause, if, where the plaintiff holds the defendant has a set-off reducing the balance, he holds the defendant, nevertheless, to the whole amount. The effect of the statute is to make the balance really due the debt for which arrest ought to be made. The stat. 43 G. 2 directs, that if a plaintiff holds the defendant for any amount without reasonable or probable cause, so holding him to bail, he shall pay costs. It is a reasonable and probable cause for arrest, if the obtaining security for that which is fairly due that must be the balance. It is said, that the plaintiff is not bound to set-off the debt due to him. It is a very good reason why the plaintiff should be required to include in his declaration the whole sum

ground for contending that a party should
 ived of his liberty. Suppose a plaintiff
 vances to a merchant to the amount of
 e true balance being, after allowing the
 et-off, only a small sum, can it be con-
 e may be held to bail to the full amount
 made? If so, it might be impossible
 obtain bail; and he might, by lying in
 it an act of bankruptcy. In this case the
 n the tender was made to him, admitted
 o be under 7*l.*, and yet, notwithstanding,
 r that, he caused the defendant to be held
 5*l.* and upwards. He had therefore no
 probable cause for holding him to bail in
 The rule must be made absolute.

1822.

DRONKFIELD
 against
 ARCHER.

Rule absolute. (a)

. Reed, on a later day in the term, a question arose,
 rs, having held a party to bail without reasonable or
 r a debt due to their testator, were within the act. And
 at they were, because an action for a malicious arrest
 them, and this was an analogous remedy.

1822.

*Tuesday,
February 5th.*

A smuggler may be a trader within 1 Jac. 1. c. 15. s. 2. as being a person who seeks his trade of living by buying and selling, although such buying and selling be illegal. A penalty due to the crown is a debt within 21 Jac. 1. c. 19. s. 2., and, therefore, where a trader lay in prison above two months, being unable to pay exchequer penalties for smuggling: Held that it was an act of bankruptcy.

COBB, Assignee of MONSEY, a Bankrupt,
vs. SYMONDS and Another,

TROVER for cattle, goods, and chattels, of the bankrupt before his bankruptcy. *Issue.* At the trial before *Dallas C. J.* Summer assizes for the county of *Norfolk*, the questions were, as to the trading and act of bankruptcy. As to the first, the only instances of buying and selling which were proved, were the purchase of large quantities of smuggled goods, and the sale of those goods at retail. No act of buying and selling legally given in evidence. The act of bankruptcy consisting in lying in prison above two months at the instance of the crown, for penalties incurred by him in connection with his smuggling transactions. The Lord Chief Justice thought, that as to the first, the case fell within *Meymott (a)*, and that as to the second, the act might properly be considered as a debt, and that the act of bankruptcy was sufficient. The plaintiff obtained a verdict. *Prere Serjt.* in last *Michaelmas* obtained a rule nisi for entering a nonsuit.

Blossett Serjt., Storks and Rolfe, shewed cause, that in this case there was a sufficient trading, unless the act of bankruptcy of it makes the difference. The statutes relating to bankruptcy, speak of the bankrupt as an officer of the law, and the preamble to 1 Jac. 1. c. 15. speaks of

(a) 1 *Atk.* 197.

wickedly become bankrupts. And it would be absurd to argue, that an additional offence, by being more wickedly and wilfully a bankrupt, prevented him from having a commission taken out. Suppose a person trades without having an apprenticeship, could it be contended, that it prevented him from being a bankrupt? Here, a person living by buying and selling, and the very fact that his trade is illegal, puts his estate in danger, and requires that his real creditors, who are unaffected by the illegal transactions, have this protection. The only effect of the illegal transactions would be to prevent the debts from being received or proved under the commission. The object of the bankrupt laws was to protect meritorious creditors, and prevent them from being in jeopardy by the improper speculations of others. The case *Ex parte Meymott* is an express point, and has been uniformly acted upon. In *Johnson*, the smuggler was made a bankrupt, and this point was never taken as an objection to the commission. As to the act of bankruptcy, it is clear, that a debt due to the crown, and the 21 Jac. 1. act, which makes the lying in prison two months an act of bankruptcy, is quite general. This is clearly within the mischief to be remedied as any other debt.

Frere, Serjt., and Robinson contra. Nothing prevents a bankrupt under such a commission as this. For all actions in which the bankrupt was engaged, the debt is legal, and so the debts due to him under this commission could not be assigned. It does not appear that *Johnson's* case was contested. In *Ex parte Meymott*,

1822.

Cons
against
Symonds.

1822.

COBB
against
SYMONDS.

Meynott, this was not the point decided, an obiter dictum of Lord *Hardwicke*. cannot be made a bankrupt, *Rex v. Cobb*. the reason given is, because he cannot contract. Here, the debts contracted are not recovered tainted with smuggling. As to getting him buying and selling, that must surely mean buying and selling. Why should an individual thus have the benefit of a certificate to protect him from any future demands? Suppose the case of a receiver of stolen goods, who equally gets him buying and selling them; could he be made bankrupt as a trader? No person could, under the circumstances of this case, have given credit to him as a trader. to the second point, the statute only speaks of a debt, and says nothing of penalties due to a person committed. A lying in prison for a misdemeanor is not within it, and this is of the same nature.

ABBOTT C. J. The words of the statute, *c. 15. s. 2.* are, that all persons seeking their living by buying and selling, may be made bankrupt, and I think the safest course for us to pursue is to give effect to the plain meaning of these words. I can find nothing to satisfy me, that the legislature did not intend to include in them every species of buying and selling, whether legal or illegal. If the point was entirely new, I should be of opinion that this was a sufficient trading within the statute, as I am by the opinion of that very eminent Lord *Hardwicke*, I entertain no doubt on this point.

true, that this was not the point decided in *Meymott* (a); but Lord *Hardwicke* there assumes a position incapable of being denied, and builds upon it. On the other point, I am clearly of opinion that a penalty due to the crown is a debt. *Jac. 1. c. 19. s. 2.*, and that the lying two years in prison under it in the present case, was a badge of bankruptcy. The rule must therefore be discharged.

And J. (b) I am of the same opinion. As to bankruptcy, it is clearly within the statute, and is really a proof of a party's insolvency, whether he is in prison because he is unable to pay a penalty or not. As to the question whether this was a trading, I am of opinion, both on the words of the statute, the authority of Lord *Hardwicke*, and the nature of the thing, that we ought to decide that the nature of it can make no difference. The words of the statute are general; "persons seeking their trade by buying and selling." Now in this case the defendant was so; and he therefore falls within the words. Lord *Hardwicke* said that it must be a lawful buying and selling. The statute, however, is entirely silent upon that point, and it would be very strange, if a party could avoid the operation of the statute by his own illegality, to prevent himself from being declared bankrupt. Lord *Hardwicke*, in *Ex parte Meymott*, treated this case as one without doubt, and appears to have decided it as if there had been a case decided upon the point. As to the principle, it seems to me that a party is liable to greater losses, when the trade which

1822.

Crown
against
Symonds.

(a) 1797. (b) Bayley J. in the Bail Court.

they

1822.

Case
against
Symonds.

they carry on is unlawful, and persons advancing money are subjected thereby to greater risk. So, the summary jurisdiction of a commissioner in bankruptcy is peculiarly advantageous in such cases. In principle, therefore, it seems to me, this is within the mischief intended to be remedied by the Statute against bankrupts. But if that were understood, it seems to me that it is quite sufficient that it is the words of the clause in 1 Jac. 1. c. 15. that points, therefore, I agree with the opinion of Lord C. J. has pronounced.

BEST J. A man who owes a penalty is a debtor to the king, and I am therefore clearly of opinion that there was a sufficient act of bankruptcy in this case. As to the other point, the opinion given by Lord C. J. in *Ex parte Meymott*, is decisive, and that has been acted on ever since. The original Statute in bankruptcy treat the bankrupt as a criminal, and intended to give prompt execution against him. Till more modern times, they never contemplated any protection to him. It seems to me, therefore, that a party who actually gains his living by buying and selling cannot be allowed to say, that because buying and selling was illegal, he is not to be considered bankrupt. This rule must therefore be discharged.

Rule discharged.

1822.

WSON *against* LINTON, Esquire.*Thursday,*
February 7th.

PSIT upon several special counts, and also they paid to the use of the defendant. Plea, e. At the trial, before *Richardson J.*, at the assizes, the only question was, as to the liability of the defendant to repay to the plaintiff the sum for a drainage tax. It appeared that the defendant had been tenant to the defendant of a farm, in a certain district, liable to a drainage tax. He paid his rent in full to the defendant, and submitted the farm, on the 6th *April*, 1820, but did not pay the drainage tax then due. When he quit the farm, without the permission of the incoming tenant, he left a stack of wheat on the premises. A demand being made on the incoming tenant by the collector of the drainage tax, due *April* 6th, 1820, the defendant refused to pay it, and a warrant of distress having been obtained, the plaintiff's stack of wheat was distrained, and in consequence, the plaintiff was obliged to pay the amount of the tax. By the local act it was provided that the tax should be paid by the tenants of the lands and grounds charged with the same respectively; and that such tenants should and might deduct the same out of the rents payable to their landlords. Where, by a local act, it was provided that a drainage tax should be paid by the tenants of the lands and grounds charged with the same, who might deduct and retain the same out of the rents payable to their landlords. And also, that in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrears, and if the same should be found untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a surety for the payment thereof, and might be taken possession of, and let in discharge of the tax: Held, that the tax should be paid by the tenants of the lands and grounds charged with the same respectively; and that such tenants should and might deduct the same out of the rents payable to their landlords. And, therefore, where an outgoing tenant having paid his rent in full, had left property on the premises, which was afterwards distrained during his tenancy, and he was obliged to pay it: Held, that he might be liable in an action against his landlord for money paid.

landlord;

1822.

DAWSON
against
LINTON.

landlord; and also, that in case of neglect the tax might be levied by distress on the goods and which should be found on the lands charged with the tax in arrear; and if the same should be unpaid, no sufficient distress could be found, the grounds chargeable should remain as a security for the payment thereof, and might be taken possession of and let in discharge of the tax. It was contended on trial, that the succeeding tenant was liable for the tax, and therefore that the action should have been brought against him. The plaintiff had a verdict. *Read* at Michaelmas term, obtained a rule nisi for nonsuit. And now

Balguy, who shewed cause, was stopped by the Court, who called on

Clarke and *Reader* to support the rule. The Statute which parliament directs the tax to be paid by the owner of the land charged; now that must mean, not the owner in whose time the tax accrued, but the tenant at the time being; and it is confirmed by the subsequent Statute, making the land itself liable if unpaid. Then if so, the incoming tenant should have been liable, and might have deducted it from the next tenant, if it was his default, therefore, which caused the distress to be taken of the wheat; and consequently the action should have been brought against him. If this were the case, the tenant, by having on the farm the goods of the landlord's persons, all of which might be distrained for the tax, might subject the landlord to a variety of actions.

C. J. It is clear that this tax must ultimately be paid by the landlord, and that the plaintiff has paid his share of it; he has therefore a right to be repaid by the landlord to repay it to him. I think the purpose of the act was to make the tax payable by the person whose time it became due, and who received the benefit of the drainage. If it had then been paid, the plaintiff might have deducted it from his rent; but he was not called on to pay it till after the rent had been paid. I think he has now the right to require the landlord to reimburse him. It might be very hard, if the plaintiff were to be compelled to advance money to pay the tax for his predecessor, even though ultimately he would be entitled to recover it. Here, the plaintiff has only for money paid for the defendant, and not for special damage arising from the distress. Therefore the rule is right.

Rule discharged.

On the Demise of SUTTON against
RIDGEWAY.

Friday,
February 8th.

A rule was applied for a rule calling upon the lessor to shew cause why, in default of payment of the costs of a former ejectment between these parties within a certain time to be named by the Court, the defendant should not be at liberty to non pros the ejectment. It appeared on the affidavits, that the defendant in case those costs are not paid before a certain day to be named by the Court, non pros the ejectment pending.

Where a rule has been obtained for staying the proceedings in ejectment till the costs of a former ejectment have been paid, the Court will not interfere, and the rule will not be made absolute.

that

1822.

DOR. dem.
SUTTON
against
RISGWAY.

that *Anne Walker*, the person last seised, *ber* 14th, 1801, and that the lessor of the his bill in equity to recover the premi which bill was, on demurrer, dismissed. term, 1819, he brought an ejectment, and at the Summer assizes of that year, was no *Hilary* term, 1820, a second ejectment was at the trial, at the subsequent *Lent* assizes, had a verdict. On the 13th *October*, 1820, a declaration in ejectment was delivered, and in term last, a rule was obtained, and made staying the proceedings until the costs of ejectment were paid. These costs had been were still unpaid. It was admitted that there was no precedent for such a motion.

Per Curiam. There is no precedent for such a motion as this; and the effect of it would be, if the party could not pay the costs without limit, he would be altogether deprived of his property by ejectment, the twenty years having expired. We think we ought not to go further than the precedents have already gone in these cases.

1822.

against the Inhabitants of WIL-
MINGTON.

Saturday,
February 9th.

es by their order removed *John Moore*,
nd family, from the parish of *Crayford* to
Wilmington, in the county of *Kent*. The
ppeal confirmed the order, subject to the
s Court on the following case.

er, *John Moore*, never did any act by
nired a settlement in his own right. In
, he was removed with his father, *Thomas*
order of two justices, from the parish of
he parish of *Wilmington*, as the place of
the pauper's father, which order was ap-
t, and upon the hearing of the appeal
The pauper, in the same year, returned
er into the parish of *Crayford*, and was
week to *Sir Henry Crewe* in that parish, in
he continued as a weekly servant for nearly
Upon leaving the service of *Sir Henry*
owed the occupation of mole-catching in
Crayford, by which he obtained his own
never resided with his father's family, nor
exercise any control over him. In the
he year 1815, when the pauper was about
left *Crayford*, and went to live first at
tenement at 4s. per week, where he con-
eight months, and in or about the month
1817, went to *Bow*, where he rented a
hard at 20l. per annum, and in which he

During the
minority of a
child, there can
be no emanci-
pation unless
he marries, and
so becomes
himself the
head of a fa-
mily, or con-
tract some
other relation,
so as wholly
and perman-
ently to ex-
clude the pa-
rental controul.
Sembles, that
the acquiring a
settlement of
his own does
not properly
constitute an
emancipation.

M m

still

1822.

The King
against
The Inhabit-
ants of
WILMINGTON.

still continues to reside. Whilst the pauper was engaged in the business of mole-catching at *Crayford*, he occasionally to visit his father both at *Pewsey* and *Bow*, and once slept at the father's house in *Bow*. he did not receive any maintenance or assistance from his father. After the father had died, he continued to reside in the house at *Bow* for rather more than a year. The pauper, who was then about 19 years of age, married a woman, and had a wife. The question for the opinion of the Court was, whether the pauper before his marriage was supported by his earning his own livelihood, or whether he was before mentioned, in the parish of *Crayford*.

Bolland, in support of the order of the Court, contended, that the pauper was emancipated when the father gained his settlement at *Bow*. He relied on the case of *Eastwoodhey v. West*, and Lord *Kenyon's* judgment in *Rex v. Offley*, and *Rex v. Walpole St. Peter's*. (c)

Berens contra, was stopped by the Court.

ABBOTT C. J. It is of importance to lay down a general rule for the guidance of magistrates in the subject of emancipation, and the best which I can lay down is this, that during the minority of a child, there is no emancipation, unless he marries, and sets up for himself the head of a family, or contracts a permanent relation, so as wholly and permanently to free himself from parental control. I say nothing about his settling on his own, because that does not

(a) 1 Str. 458.

(b) 3 T. R. 114.

(c) But

erly fall under this head. There can be; question, that in that case he is only o his own acquired settlement. Here, is under 21; and had neither married nor y such relation as I have described, at the s father acquired the settlement at *Bow*. fore not emancipated, and the order of ong.

Order of sessions quashed. (a)

Reg v. Witten cum Twambrookes, 3 T. R. 355.

the KING against RIDGWAY.

an appeal to the quarter sessions of the the county of *Lancaster*, against the fol- ction, for an offence under the statute G. 3. c. 106. s. 4. *Lancaster*, to wit. bered, that on the 19th day of *March*, , &c. are convicted before us, *R. P.* and es, two of his majesty's justices of the peace ty of *Lancaster*, of having, on the 10th of e year aforesaid, and within the space of r months next before this present 19th day the year aforesaid, at *Great Bolton*, in the *Lancaster*, attended a meeting of journeymen n, then and there had and held, for the maintaining, supporting, continuing, and a combination, for a purpose, by the sta-

ourneymen, for the purpose of obtaining an advance of wages: Held, that as synonymous with the words of the act, which prohibits combinations of wages, and that the conviction was sufficient.

M m 2

tute

1822.

The KING
against
The Inhabit-
ants of
WILMINGTON.

Mondays
February 11th.

Where the ses- sions, without hearing the merits, quashed a conviction under 59 & 40 G. 3. c. 106. s. 4. for a defect in form, the court of King's Bench will, upon a removal of the order by certiorari, quash the order of sessions, if they are of opinion that there is no defect in form, and send the case back to be heard upon the merits. It was stated in such conviction that defendants had attended a meeting for carrying on a

1822.

**The King
against
RIDGWAY.**

tute in such case made and provided, a next mentioned, declared to be illegal, combination of journeymen and workmen in bleaching, for the purpose of obtaining wages in that business, contrary to the the 39th and 40th years of the reign of King George the Third, intituled, &c. appeal came on to be heard, several objections by the counsel for the appellants to the conviction. And the Sessions, without dependence on the merits, made an order for conviction, subject to the opinion of this sufficiency in point of form.

J. Williams and *Denman*, in support sessions. Even supposing the sessions no precedent which can be found, where ever interfered after the sessions have conviction. This is like moving for a new acquittal for a misdemeanour, owing to on the part of the Judge, which is never cases in which this has been done before *Allen (a)*, *Rex v. Cook (b)*, and *Rex v. But all those cases were reserved on facts latter, the convictions had been affirmed Here too the act on which this conviction has fixed a limited time within which be preferred, which affords an additional against reserving a case on a mere point after long delay in the court above, merits at the sessions. But supposing*

(a) 15 East, 545.

(b) 3 T. R. 519.

as a preliminary objection, then the conjecture in form. It only states, that the defendant attended a meeting for the purpose of supporting, continuing, and carrying on a combination for the purpose of obtaining higher wages. Now this does not follow the act 39 and 40 G. 3. c. 106., the third section, in describing the combinations thereby prohibited, calls them combinations to obtain an advantage. Now, a combination for the purpose of obtaining higher wages is not necessarily a combination to obtain an advantage. It would include combinations for an idle, and irrelevant purpose, but the latter could only be successful if they are likely or calculated to obtain the end. It is the opinion of Lord *Ellenborough* in *Rex v. Storer & Others* (a), where he says, "It is not the agreement should be for the purpose of obtaining an advantage, but it must be for controlling, that is, for effecting that which is precisely in point with the present case. The most manifest way in these cases is, to follow exactly the words of the statute."

Altman, and *Starkie*, contra, were stopped.

J. I am of opinion, that in this case, the defendant's plea is wrong and must be quashed. This is brought before us by certiorari, and that being so, the original conviction has been quashed.

(a) 6 East, 426.

1822.

The King
against
Ridgway.

1822.

The King
against
Ridgway.

by the sessions for informality. It is to examine it, and if we cannot see any informality, we shall quash the order of sessions. But in so doing, we do not to deprive the party of his appeal on that point; therefore, we shall, after quashing the order, send the case back to them to enter a new order, and then hear the appeal. Then is there any informant who entertains greater respect for the opinion of *Ellenborough* than I do, but I own that the passage quoted from *Rex v. Nield and Others* is not in my mind. He seems to have considered *purpose* as synonymous with the word *intent*. I thought that an agreement with intent to control, was not to be an agreement to control. But by an act of parliament, I am of opinion, that a combination for the purpose of obtaining, and a combination to obtain an advance of wages, are the same thing. The section expressly prohibits combinations to obtain an advance of wages, or to lessen the time of service, or to decrease the quantity, or for any other purpose contrary to the act. That shews, that the legislature meant the word "purpose" in this act, meant it in the same sense as the word "intent," but with the same observation is deducible from the fourth section. I think, therefore, that the difference in the sense of the words used in the act, and the words of the act of parliament, is immaterial, and the conviction is sufficient.

BAYLEY J. I am of the same opinion. The words of the statute need not be used in the same sense as the words of the act. It is sufficient if the words used are equivalent to the words of the act. Now, here the words

aining," and "to obtain," are, looking at Parliament, clearly synonymous. As to the on, I entertain no doubt. The sessions and the conviction for want of form, and brought before us, no want of form appears order is therefore wrong, but I agree that and be remitted to them, that they may now on the merits.

concurring.

f sessions quashed, and case sent back to sessions to enter continuances and hear the on the merits.

(a) Holroyd J. had left the court.

against the Mayor, &c. of GREAT
YARMOUTH.

Monday,
February 11th

" Serjt. had obtained a rule to shew cause Master of the Crown Office should not the matter, and tax the defendants their se, which was a traverse to a return to a nus, commanding the defendants to ad- ector to his freedom. It appeared that, one of the common councilmen of the a material witness on behalf of the prose- pœnaed to attend the trial at the last as- k. In consequence of his absence, the

compelled to pay the costs of not proceeding to trial pursuant to notice.

M m 4

record

1822.

The KING
against
RINDWAY.

Where, in a case in which a corporation were defendants, the record is withdrawn in consequence of the absence of a material witness, who is one of the corporation, and it does not appear that such absence arises from the act of, or is in collusion with the other corporators, the pro-

1822.

The King
against
The Mayor, &c.
of GREAT
YARMOUTH.

record was withdrawn. The Master of Office certified, that upon reading the affidavits produced before him on both sides, he was of opinion that costs ought not to be paid by the prosecutor. Proceeding to trial in this case, it appearing that the proceeding to trial was occasioned by the absence of the witnesses subpoenaed by the prosecutor, the witness was a member of the corporation, and in his absence there was not any sufficient excuse tendered, in support of the rule, that the case should proceed upon a wrong principle, inasmuch as the mere circumstance of the witness being a member of the corporation, and being absent without sufficient excuse, was not sufficient, unless it appeared also that the witness, by sending himself, he had acted in collusion with the defendants.

The Court, after hearing *Storks*, who appeared for the defendants, and *Blossett Serjt.*, and *E. Alderson*, who appeared for the plaintiff, directed that the case should go to the Master to examine the affidavits again as to whether the absence of the witness was produced by his own act, or in collusion with the other counsel, directing him to award costs, in case he was of opinion that the witness's absence, although without sufficient excuse, arose entirely from his own act.

And the Court directed that the case should go to the Master to examine the affidavits again as to whether the absence of the witness was produced by his own act, or in collusion with the other counsel, directing him to award costs, in case he was of opinion that the witness's absence, although without sufficient excuse, arose entirely from his own act.

(a) Award costs? See note at end of the report.

(b) Award costs?

1822.

BLUNDELL against BLUNDELL.

Monday,
February 11th.

WS had obtained a rule to shew cause why defendant's attorney should not pay to the attorney the costs of the oppositions to bail. It appeared, that on the 17th *December* was given in the name of the defendant's that two persons of the name of *Miles* and would justify as bail on the 20th *December*. When the notice was served, the managing the defendant's attorney assured the plaintiff's that the bail were both respectable persons, and that he would consent to their justification. But, however, upon enquiry, that *Hutchings* insolvent, and upon this being discovered, the could not justify. On the 22d *December*, application to add another person as bail, and on the 2d of justification was given for *Miles*, and *Moody*, whose residence was described, *Waterloo Road, Southwark*. On the 31st *December* parties attended at Mr. *J. Holroyd's* chambers. *Moody* did not attend. On the 1st *January* notice of justification was given for the 2d, and on the 1st *January*, it appearing that *Moody's* residence was misdescribed, being No. 50, *Waterloo Road*, the bail did not justify. Another notice was given on the 4th *January*, when, upon attending at the chambers, *Miles* was rejected as being insufficient. In support of his rule, he cited *Steer v. Smith.* (a)

Where an attorney, knowing that bail are insufficient, puts them in, and gives notice of justification, he will be personally liable to pay the costs of the opposition.

(a) *Chitty*, 80,

1822.

BLUNDELL
against
BLUNDELL.

Turton shewed cause, upon an affidavit, w
that the representation made as to the resp
the original bail was made by the managing
out the knowledge, privity, or consent of the
attorney, and that the mistake as to *Moody*
was a mere clerical error: and he contended
was no reason to make the defendant's attor
costs in this case, it not appearing that he
vexatiously in the transaction.

Andrews, in support of his rule, was stop
Court.

ABBOTT C. J. Here there clearly was
sentation as to the respectability of the orig
the managing clerk of the defendant's attor
indeed now said, that all this was without
or knowledge of the latter, but he does not
at the time when the bail were put in, he w
of their insufficiency. It was his duty to ta
to put them in as bail, if he knew them to
justify; and it will be a wholesome lesson t
make the defendant's attorney, in this cas
costs.

Rule absolute,

1822.

King against the Justices of COLCHESTER.

Monday,
February 11th.

OPP, in last *Michaelmas* term, had obtained a nisi for a mandamus to the justices of Colchester to enter continuances, and hear an appeal from the overseers' accounts of the parish of *St. Botolph* in the borough of Colchester. The accounts in question had, on the 14th *May* last, been duly allowed by the justices, pursuant to 17 G. 2. c. 38., at a petty sessions; but they had not been examined and allowed at the next special sessions, pursuant to 50 G. 3. c. 49. The justices dismissed the appeal, on the ground that they had no jurisdiction.

It is not necessary in order to give the justices at sessions jurisdiction to hear an appeal against overseers' accounts, that such accounts should previously have been examined and allowed, pursuant to 50 G. 3. c. 49.

Walford shewed cause. The sessions, in question, had no jurisdiction. In *Rex v. Bartlett* (a), it was held (before 17 G. 2. c. 38.) that the sessions had no jurisdiction until the accounts had been allowed, pursuant to 43 *Eliz.*; and in *Rex v. Whitear* (b), which was decided after 17 G. 2., the same law was laid down. By the 50 G. 3. c. 49., certain other provisions were made to the mode of allowing overseers' accounts, in *Lester's* case (c), were held to be cumulative. It was so, by parity of reasoning to the cases above mentioned, that these provisions should be complied with before an appeal can be made.

Curiam. We are quite satisfied that the sessions

(a) 3 Str. 985.

(b) 3 Burr. 1365.

(c) 16 E. 574.

had

1822.

—
The King
against
The Justices of
Colchester.

had jurisdiction, and that they ought to have
appeal. This rule must be absolute.

Jessopp and Brodrick were to have supported

Tuesday,
February 12th.

FOXALL *against* BANKS and A

A certificate to
deprive a plain-
tiff of costs
may be indorsed
on the postea
after costs have
been taxed,
and although
the defendants'
attorney was
present and did
not object to
such taxation.

HUTCHINSON, on a prior day in the
tained a rule nisi, calling on the p
torney to produce the postea in this case,
B., in order that he might certify, to depri
tiff of his costs. The case, which was an action
was tried at the last assizes for *Starry*, before
when a verdict was found for the plaintiff,
farthing. The Judge, at the trial, intimated
of considering whether he should certify or
peared, by the affidavit, that the costs had be
taxed, and that the taxation had been att
clerk of the defendants' attorney, and that
was then made. Subsequently to this, a su
taken out before *Wood B.*, to shew cause wh
should not be produced, and a certificat
thereon. This summons was attended by
and the learned Judge then expressed his i
certify, but the plaintiff's attorney refused to p
postea for that purpose.

Turton shewed cause, and contended, that
cation for a certificate came too late, after the
been taxed.

m. The application was in time, for a certificate at any time be indorsed on the postea. Let it be made absolute, and with costs.

Rule absolute, with costs.

1822.

FOXALL
against
BANKS.

CHAPPELL *against* ASHLEY.

Tuesday,
February 12th.

CHAPPELL moved for a rule nisi to discharge a writ granted on a former day in this term for the defendant (under the compulsory clause of the lords' act), to give an account of his estate pursuant to that statute. It appeared that the sum due to the plaintiff amounted to 112*l.*, but the whole amount of the debts with which he was in execution exceeded 300*l.* It was contended that the second and third clauses of the 33 G. 3. c. 5. should be construed together, and that, inasmuch as the defendant could not be entitled to the relief given by the first clause, he ought not to be subjected to the writ by power in the third.

When a defendant is in execution for a particular debt under 300*l.*, although the aggregate of the debts for which he is in execution exceeds that sum, he is liable, at the instance of the particular creditor, to be brought up under the compulsory clause in the lords' act, 33 G. 3. c. 5.

CH. J. I am of opinion that the defendant is entitled to this rule. The act of parliament is a benefit for the benefit of the creditor; and I think it is competent for any one creditor whose debt does not amount to 300*l.* to avail himself of this benefit by the act, and to compel the defendant to assign his property, whatever may be the whole amount of the debts in which the defendant is in execution.

Rule refused.

1822.

Tuesday,
February 12th.

In the Matter of TAYLOR, Gent. o

A clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the crown: Held, that he could not, within

22. *22 G. 2. c. 16. s. 8 & 10.*, be considered as serving his whole time and term in the proper business of an attorney, and that he ought not to be admitted on the roll, and that having been admitted, he ought to be struck off.

E. ALDERSON, in last *Michaelmas* term a rule nisi for striking this person off attorneys of this court, upon the ground that duly served his time as a clerk to an attorney appeared upon the affidavits, that during the for which he was bound, he had been surveyor for the wapentake of *Claro*, and the borough of *Ripon*, in the county of *York*; for which occupied an office, where the business relating to taxes was conducted. The affidavits in answer to this fact, but stated that the business of the clerk did not occupy more than one-eighth of his time during all the remaining portion, he was employed in learning his profession as an attorney.

Scarlett and *Littledale* shewed cause, and that this was no more than if the time employed as surveyor of taxes had been allowed to him with the consent of his master for the acquisition of useful information, or for amusement; and that substantially he had served the full time required.

E. Alderson contra referred to *22 G. 2. c. 4* which every person who shall be bound to the office of attorney shall, during the whole time and term of his apprenticeship, continue and be actually employed by such attorney in the proper business, practice, or employment of an attorney; and by section 10., before he can be

make an affidavit that he has actually and during the said whole term of five years. There were two inconsistent employments, and, he could not possibly have served the whole term.

1822.

In the Matter of
TAYLOR.

Nam. It is very important that we should these provisions to be strictly complied with. A party having an employment under the crown whole time, could not, with propriety, have requisite affidavit. And, therefore, however may regret it, we think it our duty to make absolute.

Rule absolute.

against the Justices of SURREY.

Tuesday,
February 12th.

Y had obtained a rule nisi for a mandamus justices of *Surrey* to enter continuances, and appeal of *Andrew Barnet* against a conviction under 12 G. 2. c. 28. The defendant was on the 6th *November* last, and entered into notices to appeal against it to the next quarter

It was sworn on the one side, and denied by , that at the time of entering into recog-

his attorney gave a verbal notice to the in- of his intention to appeal. The defendant in order to prosecute his appeal at the last sessions, when, there having been no notice in writing, the Court refused to hear the The 5th section of the act giving the ap- peal

Where a statute gives an appeal, the appellant giving reasonable notice to the other parties; such notice need not be in writing, but a verbal notice, if reasonable as to time, is sufficient.

1822.

The King
against
The Justices of
Surrey.

peal states, that "persons aggrieved may have reasonable notice to the prosecutor, and recognizances, &c."

Turton shewed cause, and contended that the provisions were to judge what was a reasonable notice, and they were of opinion that the notice in writing.

Cowley and *Adolphus* contra, stopped by.

ABBOTT C. J. We are of opinion, that the statute requires reasonable notice to be given, but not necessarily mean that the notice should be in writing, but only that as to time or number of days it should be reasonable. Here, however, as the facts shew, we shall only grant a mandamus to the Justices, commanding them to examine whether reasonable notice has been given, and, in that case, to make continuances, and hear the appeal.

Rul

Tuesday,
February 12th.

JOHNSON *against* BIRLEY and O

In trespass the Court will, upon a proper case being made for it, require the plaintiff's attorney to give to the defendants information as to the place of abode and occupation of the plaintiff. And where an assault was stated to have taken place, at a meeting at which many persons were present, and the defendants did not know, and could not find out, after diligent search, who the plaintiff was, the Court thought it a proper case for discovery.

LITTLEDALE, on a former day in term, obtained a rule nisi, calling on the plaintiff to disclose the place of residence and occupation of the plaintiff to the defendants, and for stay of proceedings until the plaintiff should have given information as to the place of abode and occupation of the plaintiff. And where an assault was stated to have taken place, at a meeting at which many persons were present, and the defendants did not know, and could not find out, after diligent search, who the plaintiff was, the Court thought it a proper case for discovery.

the mean time. It was an action of trespass brought against the *Manchester Yeomanry* for their conduct on the 16th *August*, 1819. To the defendants pleaded several justifications, besides the issue. The affidavits stated that the defendants and their attorneys had made minute and parol inquiries in *Manchester* and its neighbourhood as to who the plaintiff was, without success, and had applied for the requisite information to the attorney, who had refused to give it. The issue, which the assault, if any, took place was against many thousand individuals.

John Bingham shewed cause. This is a novel case. The only instances in which it has been decided have been in qui tam actions, and in ejectment. *54. and Crompton's Pr.* 473, state this hitherto to be the rule of the Court; and in *Braceby v. Brice*, the Court expressly so laid it down. As to *Kirby (b)*, it probably was a qui tam action, but does not distinctly so appear; and so has been *Anonymous. (c)* As to *Taylor v. Harcourt*, was the case of a plea in abatement, and not upon this question. Here the existence of the cause is admitted by the plea, and if the object of the plea is to apply for security, the plaintiff may have good reasons for not disclosing his occupation and place of abode, his means being powerful, and irritated against

1822.

JOHNSON
against
BRIDLEY.

(b) 1 Str. 401.
(d) 4 B. & A. 95.

1822.

JOHNSON
against
BAYLEY.

Scarlett, Hullock Serjt., Littledale, &c. support of the rule, were stopped by the

ABBOTT C. J. It does not clearly appear from the case of *Gynne v. Kirby* was a *qui tam* case. In *Braceby v. Dalton*, the editor has suggested *quere contra*, 1 Str. 401.; so that it is at least doubtful. But, independently of any authority, it seems that the due administration of justice requires that the rule should be made absolute. If it should be made subject to be set up by any application for security for costs, it will probably be without success. But then it is not clear why the plaintiff should not give this information to the defendants. Unless they have it, they will be at great difficulty in preparing their defence. In the case of *assault* took place at a meeting of many persons, and the defendants may therefore be altogether ignorant of the plaintiff's name. The rule generally has been confined to *ejectment* and *qui tam*, because it is on those cases that it ordinarily happens that a defendant is ignorant of the plaintiff. It is our duty in all cases to do equal justice, and that requires that the rule should be made absolute.

BAYLEY J. I am of the same opinion. It is a positive affidavit that the defendants cannot, by diligent search, find out who the plaintiff is. It is not their duty to know that fact; for if they were, it would be a great obstruction to justice. By the 13th statute of *Westminster*, a plaintiff appears without an attorney, unless he had a special writ authorising him to employ an attorney. Then the pleadings were on

ad the privilege of seeing and knowing who
f was. In cases of qui tam actions and
rules of this sort have been before granted,
those cases, it not unfrequently happens that
does not know who the plaintiff is. It must
osed that the authority of *Braceby v. Dalton*
questioned. Independently of the note to
Lord C. J. has referred, the practice of
as since been materially altered. At that
courts invariably refused to require security
be given. The practice now, as to that, is
the other way. I have no doubt, that, in
exercise of the discretion vested in us, we
want this rule. Here, many thousands were
ne meeting at which the alleged assault took
t may make all the difference to the defence
o the plaintiff is, and thus to ascertain in
f the crowd he stood. The justification might
erent, whether the plaintiff was actively em-
nly a spectator of the tumult. It is requisite,
at both parties may have a fair trial, that
tion required by this rule should be given.

and BEST Js. concurred.

Rule absolute. (a)

and Others v. Smith and another, Trin. T. 1821, the
on Pleas granted a similar application in an action on the
Ex relatione Haddock Serjt.

1822.

Johnson
against
BIRLEY.

1822.

DÖE on the Demise of JOHN H
COMBE against YATES, HAWKER, and

Devise of a mansion-house and lands to trustees upon trust until John *Luscombe Manning* should attain the age of 21 years, and then to him for life, he taking and using the testator's surname of *Luscombe* instead of his own surname, with limitations over to his first and other sons in strict settle-

ment, they severally taking and using the testator's surname in. There were other limitations over to other persons. The will proviso, that when any of the premises thereby devised should vest bearing the surname of *Luscombe*, that person should, as soon as possession of the estate, take upon himself the name of *Luscombe*, and for and instead of his own surname, and should, within three years the his own name to be altered to the testator's surname of *Luscombe* by some other effectual way for that purpose, and in case any of the estate was limited, and who should be in possession of the same, should the testator's surname, but should neglect to get an act of parliament authority as effectual for that purpose as aforesaid, for the space of three years he should be in possession, that then the estate devised for the benefit neglecting to get such act of parliament, or other authority, should be void, as if no such use or estate had been thereby devised; and the same, upon the expiration of the three years, go over to and vest in remainder or reversion, in the same manner as if such person so neglecting his surname was dead without issue, upon this express condition, that such person did and should also take the testator's surname, and get an act of parliament authority as effectual for that purpose, otherwise the estate was to remain to *Manning*, before he came of age, or entered into possession of the premises upon himself, used, and bore the surname of *Luscombe* and no other. It was held, that inasmuch as he bore the surname of *Luscombe* at the time when the estate vested in them, he had substantially complied with the directions of the testator, and not incur a forfeiture of that estate by not obtaining an act of parliament authority, the proviso only applying to persons not bearing the surname of *Luscombe* at the time when the estate vested in them.

EJECTMENT to recover certain messuages &c. in the county of *Devon*. Plea. At the trial before Wood B. at the Spring Assizes for the county of *Devon*, 1819, a verdict was given for the lessor of the plaintiff, subject to the opinion of the court on the following case.

John Luscombe, of *Combe Royal*, in the county of *Devon*, being seised in fee of the premises, by will devised unto three trustees thereof and their heirs for ever, all that his messuages and tenement, barton lands and hereditaments

al, and other premises therein described, and parcels of land called *Rents*, enjoyed with last-mentioned tenement, with the rights, and appurtenances thereof, situate in *West* and all that close or parcel of land called situate in the parish of *Dodbrook*, in the said with its appurtenances, and all other his free-ages, lands, tenements, and hereditaments, situate in *Devon* or elsewhere, with their uses: upon the trusts, and to and for the uses, and under and subject to the powers, and provisos thereafter expressed of turning the same, that is to say, as for and to the capital mansion of the barton of *Combe* resaid: upon trust to permit and suffer his wife *Margaret Manning*, wife of *Richard Manning*, daughter, *Mary Creed*, her sister, and *Juliana* (who then lived with him at *Combe Royal*) the survivor of them, to hold the said mansion and premises, and to inhabit the said mansion and to take the rents of the other premises as a provision for their maintenance and education of his son *John Luscombe Manning*, son of the said *Margaret Manning*, who he willed should live therewith, and be provided for and maintained by them in all reasonable to his condition, until he should attain the age of twenty years, or die; and from and after the determination of that estate, as to the said mansion house and premises to be enjoyed therewith in trust for the maintenance and education of the said *John Luscombe Manning*, and concerning all the other parts and parcels of the said barton of *Combe Royal*, and all other the lands, &c. devised to the said trustees and

1822.

DOE dem.
LUSCOMBE
against
YATES.

1822.

Dec dem.
Luscombe
against
Yates.

their heirs, from and immediately after the
 cease to the use of the said trustees and
 trust for his said cousin, *John Luscombe Manning*
 he should attain the age of 21 years, or if that
 should first happen, and to the intent that there
 be set out at a yearly rent, and the profits thereof
 for his benefit until he should attain that age,
 and from and immediately after the said *John*
Manning should have attained the age of 21 years,
 then to the use and behoof of the said *John*
Manning and his assigns for his life, he took
 the testator's surname of *Luscombe*, as for and
 his own surname, and from and after the death of
 other determination of that life estate, to the use of
 said trustees and their heirs for the life of the said
Luscombe Manning, upon trust to preserve the said
 gent remainders, and from and immediately after the
 decease of the said *John Luscombe Manning*, to the use
 his first and other sons, and their heirs male, each
 using the surname of *Luscombe*, as for and instead of
 and their own surname; and in default of such issue,
 the use of the 2d, 3d, and 4th, and all and sundry
 son and sons of the said *Margaret Manning*, and
Richard Manning, her then husband, and of the issue
 such issue, to the use and behoof of the first and
 sons of *Margaret Manning*, by any after taking,
 severally taking and using the surname of *Luscombe*,
 as for and instead of his and their own surname,
 in default of such issue, to the use and behoof of the
 said trustees and their heirs, for the life of the said
Manning upon trust for her sole benefit, and after her
 decease, then to the trustees during the life of the

in trust to pay the rents and profits to her for similar limitations to her first and other sons, making and using the surname of *Luscombe* his and their own surname, and in default of them to the use of his cousin *J. L. Ryan* for living and using the surname of *Luscombe*, as for and to his own surname, with similar limitations to his other sons, and their heirs male severally using the surname of *Luscombe*, as for his own surname. There then came the following: Provided always, and it is my express will, hereby empower, direct, and appoint, that the one or more of the several body and bodies of the said *Manning* and *Mary Creed*, and that the said *Luscombe Ryan*, and the heirs male of his body, and every of them respectively claiming, or claiming under this my will, or any of the limitations contained, any right, estate, or title to messuage and tenement, barton lands and tenements, with the appurtenances therein before called *Combe Royal*, in the parish of *West Alresford*, or any other of the lands or hereditaments comprised in the first (a) devise of this will, not bearing the surname of *Luscombe*, shall when, and as soon as they, or any of them, shall be respectively one of the same premises, or any part thereof, by my will, take upon him or themselves, the surname of *Luscombe*, and use the same as for and instead of their own surname as aforesaid, and shall within five years, then next after, procure his and their

1822.

Dox den.
Luscombe
against
Yarré.

er devises are omitted, as they are immaterial as to the

1822.

Dor. dem.
LUSCOMBE
against
YATES.

own name or names to be altered and changed to the name of *Luscombe*, by act or acts of parliament or by some other effectual way for that purpose, and ever after have use, and bear on all occasions the name of *Luscombe* for him and them, and the heirs male of his, and their body and bodies as aforesaid, in any case any or either of the heirs male of the said *Margaret Manning* or *Mary Dredge*, *John Luscombe Ryan*, or the heirs male of any or either of them respectively, who shall be in possession of the said capital messuage, and hereditaments, called *Combe Royal*, lands and hereditaments hereby first devised, part thereof, by, under, or in virtue of which he or she shall not take and use my said surname, or neglect to get an act of parliament or so much authority as effectual for that purpose as aforesaid, within the space of three years next, after he, she, or they shall be in possession of the same as aforesaid; that in such case, the use and estate hereby given, devised, limited, of and in the same premises, shall be to the benefit of such person or persons so neglecting to get or not getting such act of parliament or so much authority as aforesaid, shall cease and become void, and the use or estate had been hereby given, devised, limited, and the same premises and every part thereof shall immediately, upon and after the expiration of three years, go over to and descend upon and be enjoyed by such person or persons as shall be next in line of reversion, or unto and upon whom the same are hereby settled or limited in the same manner and intents and purposes, as if such person or persons had neglected to change his or their surname,

or had been dead without issue of his or
 y or bodies; any thing herein contained to the
 notwithstanding. Upon this express con-
 vertheless, that such person so to take, do and
 take my surname, and get an act of parliament
 other effectual authority, for so doing as afore-
 erwise the said capital messuage and barton of
pyal; and all the other premises hereby first
 shall go over to the next person to whom the
 limited as aforesaid, who shall so take my
 as aforesaid.' On the 8th of *June*, 1776, the
 duly executed a codicil to his will, whereby he
 d his cousin, *John Luscombe*, to be a co-trustee
 three persons named in his will. Shortly after
 the codicil, viz. in *July* 1776, the testator
John Luscombe was the survivor of the four
 named in the will and codicil, and died many
 ce, leaving *John Hurrell Luscombe*, the lessor of
 tiff, his eldest son and heir at law, him sur-
Juliana Jutsham died in *November*, 1787, and
at Manning died on the 28th *October*, 1817,
 only one son, viz. *John Luscombe Manning*,
 ee named in the will. He was born the 28th
 1778, and on his coming of age in the year
 e entered and took possession of the pre-
 question, and continued in possession thereof
 e 29th of *August*, 1812, on which day he con-
 is interest to the two defendants, *Yates* and
 for the benefit of his creditors. The other
 at, *Mudge*, was tenant in possession under *Yates*
 maker. *John Luscombe Manning*, the devisee,
 in the will, before he became of age, or was let
 session of the premises in question, took upon
 himself

1822.

Doz dem.
Luscombe
 against
Yates.

1822.

Don dem.
Luscombe
 against
 YATIA

himself used and bore the surname of *Luscombe*, from thenceforth had borne and used, and should bear and use the surname of *Luscombe*, as the said *John Luscombe Manning* had done. But no act of parliament had ever been passed by the said *John Luscombe Manning*, named in the will, authorising him so to change his name, nor did he procure his majesty's warrant for that purpose until June 1818. *John Luscombe Manning*, the devisee named in the will, had been married some years, and had a son born on or about the 10th of October 1806, who was still living. Another of the devisees, intermarried with *Richard Hawkins*, and was still living. A declaration in ejectment was served in 1819.

This case was argued at the sittings before the term, by *Sugden* for the lessor of the premises, and by *Preston* for the defendant; and the following observations were made:

First, whether the directions of the testator in the will of *Luscombe* had, as far as respected *John Luscombe Manning*, been complied with. Secondly, whether in the event of those directions not having been complied with by him, the premises had thereby become forfeited. Thirdly, whether the estate limited to his first son had thereby become forfeited. Fourthly, whether the surviving devisees, by the adverse possession of *John Luscombe Manning*, and the defendants as claiming under him, had been barred from recovering them by virtue of the limitations: and if not, Fifthly, whether the plaintiff as trustee was entitled to recover for the benefit of *Hawkins*, formerly *Creed*. It is unnecessary to state the result of the case.

ents on these several points, inasmuch as the
ly pronounced judgment upon one. The
on that point, were in substance as follows:
aintiff, it was contended, that the estate of
combe Manning had been forfeited, in con-
of his not having complied with the terms of
o, by which it was required, "that any party
the estate shall come, shall, within three
t after, get and procure his name to be
d changed to the name of *Luscombe* by act of
e, or some other effectual way for that pur-
he terms of the proviso are not satisfied by
s having assumed the name before the estate
aim. In *Leigh v. Leigh (a)*, Lord *Eldon* says,
of parliament giving a new name does not take
former name; a legacy given by that name
taken. In most of the acts of parliament for
e, there is a special proviso to prevent the
e former name. The king's licence is nothing
a permission to take the name, and does not
a name, therefore, taken in that way is by
assumption." The intention of the testator in
was, that any person taking the estate under
and not having his name by descent, should be
to take it by act of parliament, and should
other surname. If the party taking the estate
me by descent, he can have no other surname;
could be no reason, therefore, for altering it;
merely assumes the surname, he does not thereby
former surname, and, consequently, the name
s not his only surname, as required by the pro-
e only effectual mode of getting rid of the
ame is by an act of parliament.

1822.

Doct dem.
LUSCOMBE
against
YATES.

(a) 15 Ves. 100.

1822.

DOX dem.
LUSCOMBE
against
YATTEL.

For the defendants it was contended, that the surname only applied to a person who did not assume the surname of *Luscombe* at the time when it came to him. In this case, *J. L. Manning* assumed upon himself and bore the name of *Luscombe* at the time the estate vested in him. It is true that he bore that surname by assumption. It is shewn, in *Camden's Remains concerning Britain*, that surnames were originally acquired by that mode; and in p. 100 the learned author gives an instance where six or seven children and four great-grandchildren, descended from *William Bellward*, by two sons, all acquired their names by assumption. The opinion of Lord Abinger in the passage cited from *Leigh v. Leigh*, and that of Lord Eldon in *Jekyll, in Barlow v. Bateman* (a), are authorities to the same effect. Now it never could have been intended

(a) But for variety and alteration of names in one family, I will give you one *Cheshire* example for divers respects, I will give you one *Cheshire* example for divers respects, I will give you one *Cheshire* example for ancient rolls belonging to Sir *William Brerton*, of *Brerton*. I saw twenty years since. Not long after the conquest *William* lord of the manor of *Malpasse*, had two sons, *Dan David* surnamed *Le Clerke*, and *Richard*; *Dan David* had *William* son, surnamed *De Mal-passe*; his second son was named *Egerton*, one of the issue of whose eldest sons took the name of *Egerton*; one son took the name of *David Golborne*, and one of his sons was named *Goodman*. *Richard*, the other son of the aforesaid *William* had three sons, who took also divers names, viz. *Tho. de Ooerton*, and *Richard Little*, who had two sons, the one named *Richard*, and the other *John Richardson*. Herein you may see the origin of names in respect of habitation in *Egerton*, *Cotgrave*, &c. in respect of colour in *Gogh*, that is, red; in respect of quality in *Goodman*; in respect of stature in *Richard Little*; in respect of learning in *Ken-clarke*; in respect of the father's Christian name in *Richardson*; all descending from *William Belward*. And the names of those so different names in *Cheshire* would not easily be believed they were descended from one house, if it were not by so ancient a proof." *Camden's Remains concerning Britain*, 1637. p. 141.

(b) 5 *Pears, Will.* 64.

that he who was legally entitled to bear his name when the estate descended to him, should object of parliament for the purpose of changing; for suppose that *J. L. Manning*, having taken the name of *Luscombe*, married and had children, and died, it might as well be contended, in that case, when the estate descended upon any of those children, that they who never had any other surname were bound to obtain an act of parliament, making a proviso upon them to keep the surname of *Luscombe*. But the proviso does not absolutely require that there should be an act of parliament, but that it should be by that means, or some other authority as effectual for that purpose. Now the assumption of the new surname is a mode equally effectual of acquiring a new surname as an act of parliament.

Cur. adv. vult.

now the judgment of the Court was delivered by

CHIEF JUSTICE C. J. This case was argued in October last, by my Brothers *Holroyd* and *Best* and me. Several points were urged in argument at the bar, but, as our business proceeds upon one only, it is not necessary to advert to the others. It appears, by the case, that *John Manning* took no estate in the lands devised to him at the time he came of age; and it is found, that before he came of age, and before he was let into possession, he assumed upon himself the surname of *Luscombe*, and has since borne and used the surname of *Luscombe*, and never changed; so that he has undoubtedly, in this respect, complied with the words of the direction contained in the will whereby the lands are given to him, and has in substance

1822.

DOX dem.
LUSCOMBE
against
YATES.

1822.

DOE dem.
LUSCOMBE
against
YATES.

substance complied with the desire and intention of the testator, which was, that the person who should possess the lands should bear his name. But it is said that the defendant did not comply with the terms of the proviso, though he had taken and used the surname of YATES before he came to the estate, yet he did not, until three years after he took possession of the estate, and did not change his name by virtue of an act of parliament, or other sufficient authority for that purpose, and that therefore the name of LUSCOMBE, by that omission, for ever gone from him, and from his son, and him alone, but also from his son, who would have succeeded him at the death of his father, have taken an estate tail, and not an estate in fee, will, if his father had, within three years, of the date of the act of parliament, or other sufficient authority. And we pronounce a judgment to this effect, under the circumstances that I have mentioned, it behoves us to construe wherein the general intent of the testator, and the course in which his land should be enjoyed, and the substance I have before observed, substantially complied with the proviso, regard to the name, to look carefully into the description in the proviso, and see who and what descriptions of persons are contained within it. And we are to construe this as this is a proviso introduced to defeat an estate, and not a gift, vested, for the breach of a condition subsequent, and in the nature of a forfeiture, and consequently the words of it must, according to general rules of construction, be construed strictly, and effect must be given to it, unless the supposed intention of the testator be expressed in plain and unambiguous language. The proviso consists of two parts. The descriptive part of the first part is, "the heirs male of the several persons, *Margaret Manning*, and of *Mary Creed*, and of *John Creed*, and the heirs male of his body *not bearing the name of*

name." These are the persons required to take the name. In the second part of the proviso, and contains the devise over, the words "*not bearing the surname of Luscombe*," do not again occur; but this part must be taken with reference to the first; in this part other words of the same import are used, for the lands are to vest in the person who is next entitled to take, if the person so neg-lected to change his surname was or had been dead at the issue of his body. This then introduces the question, what sense and meaning ought, in the construction of this proviso, to be put upon the words "*not bearing the surname of Luscombe*:" whether a bare use of that name de facto be sufficient, or whether it is requisite that it should be borne by authority of an act of parliament, or other special authority? If the testator clearly intended the bearing of this name by virtue of some particular authority, it would have been necessary for him to have expressed that intention. He might have said, "not bearing the name by virtue of an act of parliament, or some other authority as effectual;" according to the expressions used in another part of the will, or he might in some way have referred to that part of the proviso, as by saying, "not bearing the name after mentioned," or something to that effect. As nothing of this kind occurs in this part of the will, it is to be presumed that the words are general and simple, "*not bearing the surname of Luscombe*," so that if any qualification is to be introduced, it can only be done by the addition of some other words, and such addition must be made by implication or intendment. But we think it ought not to make this addition for two reasons; because the effect of this clause, as before observed,

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 DOR DEM.
 LUSCOMBE
 against
 YATES.

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Doz dem.
LUSCOMBE
against
YATES.

served, is to defeat and divest an estate actually and, secondly, because such an implication or ment is not necessary to effect the general intention of the testator. For a name assumed by a voluntary act of a young man at his outset, adopted by all who know him, and by which he is constantly called, becomes, for all purposes to my mind, as much and effectually his name as if he had obtained an act of parliament to confer it on him. We would not be understood to say that a testator expressly requires a name to be taken by act of parliament, or other specified mode, and falling short of the specified mode may be sufficient for it; or to say, that under this particular voluntary assumption of the name after the party has possessed of the estate, would be sufficient. We mean is this, that as the testator has annexed the press qualification to the words, *bearing the surname of Luscombe*, and the word surname is not used in the will to denote a name inherited from the father, but bearing de facto, answers every useful purpose that can be obtained under the authority of an act of parliament, a bearing de facto, though by voluntary assumption, is sufficient to satisfy the general and meaning of the words "bearing the surname;" we cannot say with certainty that the testator intended anything more, or meant to use the words in that and restrained sense which must be given to them in order to pronounce that the condition has been performed and that the estate shall pass over to another person. For these reasons we, who heard the arguments, are of opinion that a nonsuit should be entered.

Judgment of

1822.

S and Another against ARMITAGE.

PSIT for the price of two chests of tea. general issue. At the trial before *Abbott C.* *Middlesex* sittings after *Hilary* term, 1821, appeared to be the facts of the case: The who were wholesale tea-dealers in *London*, the habit of shipping teas to the defendant, a grocer, resident at *Barnsley* in *Yorkshire*. course was to deliver the tea at the wharf of in *London*, to be forwarded by the first several parcels of tea, sent in this manner, paid for by the defendant. On the 3d *June*, plaintiffs delivered at *Staunton's* wharf two a, to be forwarded to the defendant in the er. The vessel in which this tea was shipped her voyage. The plaintiffs, on the 10th of mitted by post to the defendant an invoice of d on the 13th, the defendant returned the t, and stated "that he had nothing to do with d heard of the loss of the ship before the ived, and that he would not take to the ac- here was no other evidence of any order hav- ven to the plaintiffs for the tea in question: facts the Lord Chief Justice directed the ey might fairly presume that the defendant a parol order for the tea, and stated that he ve the question for the opinion of the Court, e delivery of the tea, and the acceptance of harfinger, for the purpose of transmitting it

O o

by

A., a merchant in *London*, had been in the habit of selling goods to *B.*, resident in the country, and of delivering them to a wharfinger in *London*, to be forwarded to *B.* by the first ship. In pursuance of a parol order from *B.*, goods were delivered to, and accepted by the wharfinger to be forwarded in the usual manner: Held, that this not being an acceptance by the buyer, was not sufficient to take the case out of the 29 *Car.* 2. c. 5. s. 17.

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HANSON
against
ARMITAGE.

by the usual conveyance, was to be deemed acceptance by the buyer within the meaning of c. 3. s. 17. The jury having found a verdict for the plaintiffs, a rule nisi was obtained in law for entering a nonsuit, against which

Scarlett and *Littledale* now shewed cause. The acceptance of the tea by the wharfinger was not acceptance by the buyer to satisfy the contract, c. 3. s. 17. *Staunton* was the agent of the defendant, the jury having found that there was an acceptance of the goods, it must be taken that there was an acceptance of them by the usual mode of conveyance. The acceptance therefore by *Staunton* was an acceptance for the defendant. This case is distinguishable from *Emery (a)*, for there the seller undertook to convey the goods to the purchaser.

Gurney and *Chitty* contra. The statute c. 3. s. 17. enacts, "that no contract for the sale of goods for the price of 10*l.* shall be binding, except the buyer shall accept part of the goods so sold, and pay for the same, or receive the same." Here there has been no acceptance by the buyer, but by a person who was not the buyer for the purpose of shipping the goods, and who had no opportunity of objecting to the quality of the goods, to make it a sufficient acceptance by the buyer. Under the statute, the latter ought to have had an opportunity of objecting to the quality of the goods, *Kearney v. Son (b)*, and *Howe v. Palmer (c)*. In *Armstrong* the goods were actually shipped on board the ship.

(a) 4 *Maule & S.* 262.(b) 3 *Bos. & P.* 401.(c) 3 *Barn. & A.* 321.

the buyer, and yet that was held not to be a
acceptance. They also cited *Dawes v. Peck*. (a)
Cur. adv. vult.

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C. J., in the course of the term, delivered
of the Court, and after stating the point
for their consideration, viz. whether there had
sufficient acceptance of the goods to take the
the statute of frauds, added, that the Court
opinion that the acceptance in this case, not
the party himself, was not sufficient: and he
the case of *Howe v. Palmer*, where it was
there could be no actual acceptance so long as
continued to have a right to object either to
m or quality of the goods.

Rule absolute for a nonsuit.

(a) 8 T. R. 350.

RULES OF COURT.

ORDERED, That from and after the last day of this
never two or more notices of justification of
have been given, before the notice on which
appear to justify, no bail be permitted to
without first paying (or securing, to the satis-
the plaintiff, his attorney, or agent) the rea-
posts incurred by such prior notices, although
s of the persons intended to justify, or any of
y not have been changed; and whether the
ioned in any such prior notice shall not have
or shall have been rejected.

By the Court.

It

1822.

IT IS ORDERED, That from henceforth, no key, officer, or other person, employed by marshal, shall receive or take, except from any fee, gratuity, or reward, for or in respect of an enquiry into the sufficiency of any person proposed or intended to give security upon the rules of the King's Bench prison, or in respect of the granting of the said rules. And the marshal do dismiss any person who shall offend against the said rules. AND IT IS FURTHER ORDERED, That a copy of the said rules be kept hung up in the said prison, in the place where the table of fees is hung up.

IN order to prevent the fraudulent issuing of *execution*, without a judgment to support the same, IT IS ORDERED, That the sealer of the writs of the King's Bench do not seal any writ of *feri facias*, or *capias ad satisfaciendum*, without having the judgment-paper, or process, in requisition, produced to him. AND IT IS FURTHER ORDERED, That the attorney concerned for the party in the cause, or his agent, shall, upon all *process*, and every writ of *attachment*, and *habere facias possessionem*, and *capias ad satisfaciendum*, indorse the name and abode, and addition of the party against whom the writ is issued (or such other description as may be given by such attorney or agent may be able to give the same). IT IS ALSO ORDERED, That no judgment be entered in any *cognovit*, without such *cognovit* being first filed with the clerk of the dockets, and, after taxes and costs, filed with him.

END OF HILARY TERM.

C A S E S

ARGUED AND DETERMINED

1822.

IN THE

t of KING's BENCH,

IN

Easter Term,

Third Year of the Reign of GEORGE IV.

NG RAY the younger *against* PUNG.

the Chancellor sent the following case for the
of this Court.

entures of lease and release, dated the
26th September, 1800, certain lands, &c.

were duly conveyed and assigned ~~by~~
ay the elder, his heirs and assigns, to
f such persons, and for such estates, and
proportions, and for such terms of years,

such provisoes, &c. and subject to such
and in such manner as *James Ray*, by any

e. C. D., at the time of making the appointment, was married. His wife
to be dowerable out of these lands.

Certain lands
were conveyed ~~to~~

~~by~~ A. B., his
heirs and as-
signs, to such
uses as C. D.
should by deed
appoint; and in
default of, and
until appoint-
ment, to the
use of C. D.
in fee. C. D.
afterwards, in
execution of
the power, by
deed duly made
an appointment
of the said es-
tates in favour

P p deed
a Trustee — See 5. Mad. Case case

1622.

 RAY
 against
 Fung.

deed or deeds by him signed, sealed, and in the presence of, and attested by two or more witnesses, should from time to time to time limit, or appoint the same; and as to the same, it is so to be appointed, if any should be appointed, respectively end and determine; and as to the same and parts of the said premises whereof the same declaration, limitation, or appointment should be made, and in default of, and in the meantime, it should be made, to the use of *James Ray* and his heirs and assigns, for ever. *James Ray* and his heirs and assigns, towards duly made, and executed, in the presence of two credible witnesses, certain indentures of appointment, and release, dated the 20th day of *March*, 1816; by which it was witnessed that *James Ray*, for the valuable consideration therein mentioned, by virtue of the power or powers therein given by the first-mentioned indentures, and by every other power, and powers him in any manner in that behalf, did irrevocably declare, limit, and appoint that all the said lands, &c. should, from the execution of those indentures, remain and be held upon the trusts, and for the intents and purposes thereininafter limited, expressed, and declared of the same; and by the same indenture it was witnessed, that for the consideration afore-mentioned, *James Ray* did grant, sell, release, and confirm unto the plaintiff *Ray* the younger, in his possession the same, by virtue of the said lease, and to his heirs and assigns, lands, &c.; to hold the same unto the plaintiff *Ray* the younger, his heirs and assigns, to the

, and for the intents and purposes thereafter
 and declared concerning the same; and it
 the same indenture declared, that as well the
 ent as also the grant and release thereinbefore
 , should respectively operate and enure to
 es, and upon certain trusts therein expressed
 ained in favour of *Golding Ray* the younger.
 y, at the time of the execution of the last-
 l indentures in 1816, was married: and he and
 re still living. The question for the opinion of
 t was, whether, under the circumstances, the
 mes *Ray* would be dowerable out of the lands,
 , and hereditaments comprised in the herein-
 ted indentures, in case of her surviving her
 The case was argued at the sittings before
 elmas term, by

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 RAY
 against
 FUNA.

, for the plaintiff. The right to dower was
 y the execution of the power. It may be pro-
 ns a general rule, that if an estate be con-
 ularly and formally to such uses as the settlor
 oint, and in the meantime, and until appoint-
 the use of himself and his heirs, the settlor
 alified and determinable fee, to continue until
 ercise of the power of appointment, the fee shall
 he person to whom it shall be appointed. (a)
 ee dower is incidental; the wife is dowerable of
 it continues, and so far as her title to dower
 be excluded, postponed, or defeated by ap-
 t. When the settlor makes an appointment,

(a) *Bulle's* note to *Co. Litt.* 216. a. and 241. a.

1822.

 RAY
 against
 Fung.

a new use springs up and vests in the appointee, the fee originally limited to the settlor will not merge with it, the right of the wife to her dower, in this fee, will also be defeated. From that time the appointee under the power will take effect in the same manner as if it had been inserted in the deed creating the power, and as if it had stood in the deed creating the power. If no appointment is made, the power, being qualified and determinable, becomes singular and absolute. *Tickner v. Tickner* (a), and *Sir Edward Dene v. Maundrell* (c), are authorities to prove that a fee may well subsist distinctly in the same land as the power, that the power is not merged in the fee. It is a different doctrine, which has occasioned great difficulty in the profession, was laid down in *Good v. Ham* (d); but that doctrine cannot be supported by the decision in that case was right, because the power was not seized by the rules of the common law, and the learning of uses: and she had not any interest distinct from the fee. This mode of limiting a power in its original form adopted by conveyancers for the express purpose of enabling the husband to claim a dower. (e) Dower is a derivative interest which when the estate of the husband ceases, the dower also ceases. The general rule, *cessante causa cessat effectus*, applies to this case. The appointee under the power takes as if the land had been limited to him by the deed creating

(a) 3 Atkyns, 742.

(b) 6 Rep. 1.

(c) *Maundrell v. Maundrell*, 10 Ves. 255.

(d) 1 Bos. & Pul. 192.

(e) *Fearne's Reminders*, 346. edit. 1809.

fore is in quasi by the act of the donor, and is to be considered as if the husband never had the fee. For that fee was defeated, and never absolute; and in the result the wife is, therefore, able. Her title to dower was as defeasible as husband's fee, and was defeated when that fee was shed and avoided by the operation of the appointment made in exercise of the power. In *Maunder v. Maundrell* (a). Lord Eldon says, "The fee vests on the execution of the power, and the execution of the power is a limitation of the use, under and by the operation of the instrument by which the power was reserved. When a conveyance operates on the fee only, there is not any execution of the power, then dower is not barred; but when the power is executed, the right to dower is extinguished." The opinion of Heath J. in *Holford* (b), is an authority to the same effect. No doubt was expressed by Lord Alvanley, in *Cox v. Holford* (c), the point was not judicially before him. In the case of *Sammes v. Payne* (d), and *Buckley v. Thirkell* (e), the question was, whether the husband was entitled to curtesy, and that is a very different question from the present. Besides, the authority of the latter case (f) has been frequently questioned. In *Moreton v. Lees* (g), a case exactly like the present, it was expressly held by Richards C. B.,

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 RAY
 against
 Fung.

Ves. 355.

Ves. jun. 631.

Doe & Pul. 652.

Marke on Dower, 181. Sugden on Powers, 335. Buller, Co. Litt.

Sugden on Powers, 339.

(b) 3 Ves. jun. 657.

(d) 1 Leon, 168.

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 RAY
 against
 FONG.

and Wood B., that an appointment of the husband defeated the wife's right to dower fee, which was itself defeated by the executorial power. And in *Rouch v. Wadham* (a), the wife was considered as defeated by the appointment of the plaintiff, therefore, is entitled to the judgment of the Court.

Barber, for the defendant. The fee in the issue was vested in *James Ray*, subject to a power in the issue to appoint the fee; and being once vested in him, the right to dower accrued; and he could not, by the appointment under the power, divest himself of the fee. See *Cunningham v. Moody* (b), and *Doe v. Mainwaring*. The authorities expressly in point to shew that the fee was vested in *James Ray* until he executed the power. In *Goodill v. Brigham* (d), there was a devise to a feme covert, with a power to dispose of the fee, and to put out the control of her husband; that power was held to be void, as being inconsistent with the fee given to her in the first instance. And in *Cox v. Chanter*, Lord Alvanley, commenting upon the case of *Goodill v. Brigham*, says, "I do not conceive the Judge to decide, that where there is a conveyance to a man, who uses as a man shall appoint, and in default of appointment, to his own right heirs, the party may, by the power, create an estate that will supersede the fee, though not, perhaps, to bar dower." See also *Maundrell v. Maundrell* (f), where a husband had

(a) 5 East, 283.

(c) 4 T. R. 39.

(e) 4 Ves. 631.

(b) 1 Ves. sen. 174.

(d) 1 Bos. & Pul. 1.

(f) 7 Ves. 567.

at, and in default thereof an estate for life, re-
his heirs, the Master of the Rolls held, that if
was good, yet that a purchaser, taking by a
adapted to pass the interest of the estate as a
of the fee, and not as an appointment, was sub-
wife's claim of dower; and in delivering the
he says, "The power of appointment is merely
and nothing distinct or different from the fee:
clearly in the husband, until appointment.
v. Brigham it was held, that a power added
was merely void. So the power in this case,
a limitation of the fee, must be absorbed in
which includes every power. The reason com-
mon why a power may have effect, though
the owner of the fee, is, that he may appoint
by which his legal fee would not entitle him to
give no opinion upon the sufficiency of that
in this case, it is to such uses as he should
will appoint, that is, by deed or will, legally
and by those instruments he might have passed
though nothing was said about the appoint-
ment limitation, therefore, operates purely as a
of the fee, and that fee he could only convey,
his right of dower." It is true, that in *Maun-*
undrell (a), Lord *Eldon* expresses a decided
that a power capable of being executed may
be to the person having the fee; but he does
not at the consequence of executing the power
to deprive the wife of dower. In *Cross v.*
the party had the power to charge an estate,

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against
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10 Ves. 246.

(b) 3 Bro. C. C. 30.

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 against
 PUNG.

of which he was tenant for life, with inheritance, with a contingent fee to himself. A contingent fee afterwards came to him: Lord Eldon said that the power was merged. In *Wilde v. Sammes*, *v. Payne* (b) *Anderson J.* lays it down that a feoffment be made to the use of *I. S.* until *I. D.* hath done such a thing, and the use of *J. D.* and his heirs, the thing is done. In *Thirkell* (c) there was a devise to trustees to receive the rents and profits, and apply the same to the maintenance of *Mary Barr*, until she should attain the age of 21 years, or be married; and if she should not attain such age, or being married, then the trustees were to pay the same to her, but in case she should happen to die before she attained the age of 21 years, and without leaving issue, there was a devise over. *Mary Barr* married a child, and afterwards died under the age of 21 years, without leaving issue. The Court of King's Bench was of opinion that her husband became entitled by curtesy, to the estate for his life. In the present case, therefore, the wife is entitled to dower.

The following certificate was afterwards made:

This case has been argued before us; and we are of opinion, that, under the circumstances, *James Ray* will not be dowable out.

(a) 4 Taunt. 336.

(b) 1 Leon. 168. Golds. 81.; and see *Park on Dower*.

(c) 3 Bos. & Pul. 652. and Col. Jur. 332.

and hereditaments comprised in the herein-
 ted indentures, in case of her surviving her

1822.

RAY
 against
 PUNG.

C. ABBOTT.

J. BAYLEY.

G. S. HOLKBYD.

W. D. BENT.

and Countess of JERSEY and Others

against DEANE.

ice Chancellor sent the following case for the
 on of this Court. By indentures of lease and
 dated the 15th and 16th December, 1806,

By marriage
 settlement,
 dated Decem-
 ber, 1806, cer-
 tain manors and
 lands were

husband for life; remainder to the wife for life; remainder to the use of the first
 s of the marriage successively in tail male; remainder in case the wife should sur-
 and, to her in fee; but if she should die in the lifetime of her husband, remainder
 ers successively in tail male; remainder to the use of such persons related by blood
 inity, and in such estates or interests, and in such manors, and charged with
 f money in favour of such persons so related, as she by her will might ap-
 in case of no such appointment, to her in fee. The settlement also contained
 the trustees there named, at the request, and by the direction of the husband
 the survivor, to sell or exchange the settled estates, and for that purpose, to
 and any of the uses contained in the settlement; and also a covenant by the
 further assurance on his part, and that of his wife, and all persons claiming
 In pursuance of this settlement, certain fines were levied. By deed dated
 7, reciting the settlement, and the fines levied in pursuance thereof, and the
 therein contained, and further, that the wife was desirous of acquiring an
 ver of appointment over the manors, &c. comprised in the settlement, in the
 surviving, or dying in the lifetime of her husband, and there being a general
 sue of her body, inheritable to the manors, &c. under the settlement, the
 d wife covenanted to levy certain fines, sur conuance de droit come ceo,
 nations, to J. G. and his heirs, of all the manors, &c. comprised in the settle-
 ch fines were to operate, and to be taken to operate first for corroborating the uses
 the settlement antecedently to the limitations to the use of the wife in fee-
 subject thereto to the use of such persons, &c. as the wife by will or deed might
 In pursuance of this latter deed, several fines come ceo were levied by the hus-
 wife: Held, that under these circumstances, these latter fines did not operate to
 destroy, or suspend the right or power of the husband and wife, and the sur-
 to, to request and direct a sale or exchange of the settled estates under the
 that purpose contained in the settlement, so as to prevent an exercise of those
 the trustees.

being

1822.

Earl of Jersey
and Others
against
DEANE.

being the settlement made after, but in pursu-
ticles entered into before the marriage of
Jersey with the Countess of *Jersey*, his wife,
certain fines duly levied by the Earl of *Jersey*
wife, certain hereditaments, the inheritance
Countess of *Jersey*, were limited to the use
and *John Lord B.*, their executors, &c. for
nine years, to commence from the 23d of
but upon the trusts thereafter mentioned
mainder to the use of the Earl of *Jersey* and
for his life, without impeachment of waste,
remainder to the use of the Duke of *B.*
as trustees, to support contingent remainder
mainder, in case the Earl of *Jersey* should
lifetime of the Countess of *Jersey*, leaving
eldest or only son, entitled to the said
ments, immediately expectant upon the death
Countess of *Jersey*, and who should, at the death
the Earl of *Jersey*, have attained, or should,
life of the Countess of *Jersey*, attain twenty
to the intent that he, after attaining twenty
during the joint lives of himself and the
Jersey, should receive a certain yearly rent-charge
in mentioned, payable out of the said hereditaments
usual powers of entry, &c., for better security
payment of the same; and subject thereto to
the Earl of *Clarendon* and Lord *Lowther*, their
tors, &c. for the term of one thousand years
mence from the decease of the Earl of *Jersey*
impeachment of waste, upon certain trusts
mainder to the use of the Countess of *Jersey*
assigns, for her life, without impeachment of
with remainder to the use of the Duke of *B.*

99 7 1/2

Earl of Jersey

and others

and others

rent for 1000 years

and others

to support contingent remainders; with re-
 the use of the first and every other son of the
 cessively, in tail male; with remainder, in
 untess of *Jersey* should survive the Earl, to
 r, her heirs and assigns for ever; but in case
 lie in the lifetime of the Earl, then to the
 first, and every other the daughter and
 of the marriage successively, in tail male;
 der to the use of such person or persons
 blood or consanguinity to the Countess of
 for such estates or interests, and in such
 I subject to, and charged or chargeable with,
 or other sums of money in favour of such
 related, and subject to such powers, &c.
 of money, powers, &c. being for the benefit
 e or more persons, related by blood or con-
 to the Countess of *Jersey*,) and in such man-
 Countess of *Jersey*, notwithstanding her co-
 her last will in writing, or by any codicil
 ned and published in the presence of three
 dible witnesses, should direct, limit, or ap-
 in default of such direction; &c. and so far
 , if incomplete, should not extend, to the
 aid Countess in fee. And it was by the said
 f release, among other things, declared, that
 nd might be lawful to and for the Duke
 &c., and the survivors or survivor of
 the executors and administrators of such
 at any time or times thereafter, at the request
 direction of the Earl and Countess of *Jersey*,
 r joint lives, and of the survivor of them,
 some writing under their respective hands
 or under the hand and seal of the survivor,
 attested

1822.

Earl of Jersey
 and Others
 against
 DEANE.

*remitted to the
 for 1/4 of the sum
 if not to demand in
 full*

*remitted to the
 for 1/4 of the sum*

*proven to the
 the*

*strongly
 at the request of the
 & the*

with a letter 1822.

**Earl of Jersey
and Others
against
DEANE.**

attested by two or more credible witnesses either by way of absolute sale or in exchange of other lands, &c. to be situated in England, all or any part of the manors granted and released, (except the manor called *Osterley*,) and the inheritance thereof, to any persons whomsoever, for such term of years, or for ever, or for such such equivalent, in manors, lands, &c. as the Duke of *Bedford*, &c. or the survivor of them, &c. should seem reasonable; and that, in effecting such sale or exchanges, it should be lawful for the said Duke of *Bedford*, &c. and survivor of them, &c. at such request, direction, and so testified as aforesaid, to execute such deeds, instrument or instruments in writing, and to deliver the same in the presence of, and attested by two or more credible witnesses, absolutely to take effect, to confirm, and make void all and any of the powers, &c. therein contained, of and to the said hereditaments so proposed to be sold or conveyed, or any part thereof; and by the same or any other deeds to limit, &c. any uses, estates, or interests in the said hereditaments, the uses of which should be revoked, which it should be thought expedient to make, &c. in order to effectuate such sales or exchanges, that it should likewise be lawful for the said purchasers to give their several receipts and discharges and receipts to the purchaser of their respective purchase monies, and that the said indenture of settlement was confirmed by the Earl of *Jersey*, for further assent, part, and on the part of the Countess of *Bedford*, and persons claiming under him the said Earl

indenture bearing date the 20th day of *March*,
 made between the Earl and Countess of
 wife, of the one part, and *T. G.* of the other
 the said indentures of lease and release
 and 16th days of *December*, 1806, and the
 in pursuance thereof, and the limitations
 the settlement, and reciting that the said
Jersey was desirous of acquiring an abso-
 of appointment over the manors and other
 comprised in the settlement, on the event
 surviving or dying in the lifetime of the said
Jersey, and there being a general failure of issue
 inheritable to the said manors and other
 under the limitations contained in the
 it was witnessed, that, for the purpose
 re mentioned, the Earl of *Jersey* did thereby,
 his heirs, &c. and for the Countess of *Jer-*
se (she thereby consenting thereto), cove-
 grant to *T. G.*, his heirs and assigns, that
 Earl and Countess of *Jersey* would, as of
Trinity term, 1807, or some other subsequent
 the costs of the Countess of *Jersey*, levy nine
 es, sur conuzance de droit come ceo, &c.,
 mations, unto the said *T. G.* and his heirs,
 manors, &c. mentioned and conveyed by the
 ment, and fines levied in pursuance thereof,
 respective rights; and it was thereby agreed
 ed, between the said parties thereto, that as well
 es so as aforesaid, or in any other manner so
 and levied, and also all other fines, common
 &c. already or thereafter to be levied, suf-
 executed between the said parties thereto, of
 manors, &c. should, immediately after the
 levying,

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levying, suffering, and perfecting of the same to operate and be taken to operate, first, for the several uses, trusts, &c. limited, contained, of and concerning the said settlement, antecedently to the several uses therein respectively contained to the use of *Jersey* in fee simple; and after the sooner determination of the several uses and in the meantime subject to the said uses to the use of such persons, for such estates, trusts, &c. and subject to such powers as the Countess of *Jersey*, by any deed or deed without power of revocation or new appointment sealed and delivered by her, in the presence of more credible witnesses, or by her last will or any codicil thereto, or any writing purporting to be her last will, or any codicil thereto, signed and witnessed in the presence of three or more credible witnesses, should from time to time, either before or after the death of the Earl of *Jersey*, or after his death, notwithstanding her then present or any future direction, limit, or appoint; and in default of such direction, limitation, or appointment, to extend, to the use of the Countess of *Jersey* and her heirs and assigns, for ever. In pursuance of the proviso contained in the said indenture, nine several fines, surcoatages, and other duties, &c. were duly levied by the Earl of *Jersey* and his wife, in *Trinity* term, 1807, of the said manors, &c. in the above indentures mentioned. On the 15th day of *June*, 1816, certain freehold and other hereditaments comprised in the said recited

p for sale, and the defendant, *Ralph Deane*, purchaser, for the sum of 4010*L.*, and paid of 20*L.* per cent. upon the purchase—
 d signed a written agreement to complete e on or before the 11th day of *October*, 1816, a good title made. The question for the Court was, whether the fines levied by d Countess of *Jersey*, in *Trinity* term, 1607, not operate to extinguish, destroy, or sus-
 power or right of the Earl and Countess, survivor of them, to request and direct a sale ge of the settled estates under the powers rpose contained in their marriage-settlement, revent an exercise of those powers by the the settlement. The case was argued in last t term, by

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or the plaintiff, who contended, first, that the levied by persons one of whom had the fee, and ere a rightful and not a wrongful or divest-
 nce. Secondly, that although a fine is an gment upon record of a fee simple in the nd will, unless controuled by the agreement ies, have a divesting operation; yet that its is not of that inflexible nature, but that it ad is controlled by the agreement of the par-
 e purpose of effecting any particular or spe- e. Thirdly, that the fines were by the settlers, xpressly, and were so declared to be, for fur-
 ance, and in confirmation of the prior uses n the settlement.
 case (a), is an authority in support of

(a) 1 *Rep.* 76. a.

the

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the first point: there, tenant for life a mainder-man in tail joined in a fine, and yet the Court held it no discontinuance of the first or second remainder in tail, by the parties joining in the fine gave but a lease, which he might lawfully give, viz. the tenant for life, of his estate, and he in the remainder a lease determinable on his estate tail; and so it was held in the forfeiture of the estate of the tenant for life in the case of Earl of Clanrickard's case (a), this doctrine was confirmed by Lord Hobart; and in *Trepur v. Popham* C. J. says, "If tenant for life; and he dies, and his son, make a gift in tail, rendering rent, the tenant for life have the rent during his life, for the mainder is a greater estate than he has, is not any forfeiture, but he joins with him in reversion." Lord Hobart in *Lane v. Vane* (c), puts the question on the ground, and confirms the authority of the cases. The case of *Smith v. Clifford* (d), is a case where the tenant for life, having himself a mainder in tail, suffered a recovery; and there was in that case an intermediate estate, yet it was held to be no ground of forfeiture, because he had no power upon himself to do any act inconsistent with the mainder estate. Yet in that case there was no intention here, to preserve the intermediate estate; and the doctrine therefore, is stronger in favour of the position now maintained for. It may be said, that that was the case of a mainder where the tenant for life having parted with the mainder for life at the time, was vouched only in reversion.

(a) *Hob.* 275.(c) *Sir T. Jones*, 98.(b) 6 *Rey.*(d) 1 *T.*

but the judgment did not proceed on that
Pelham's case (a) was also the case of a
 and yet held a forfeiture. It is indeed re-
 that in 2 *Rep.* 74., and 10 *Rep.* 44., Lord
Pelham's case as one of a tenant for life
 recovery, and conveying away the fee.
 however, was overruled by *Smith v. Clyfford*;
 not true that in the latter case, the tenant
 and not the estate for life in him when
 For 2 *Inst.* 241, and *Com. Dig.* tit. *Voucher*,
 that the vouchee stands in the place of the
 that the demandant counts against him for
 ee. *Garrett v. Blizard* (b) will be cited on the
 but that case turned on the intention of
 which was to do an act inconsistent with
 ediate estate. Here there was no such in-
 and therefore this fine produced no forfeiture;
 this case, Lady Jersey had the first estate of
Roper v. Halifax, *Sugden on Powers*, last
appendix, 641., is also an authority in point.
 be contended, that the effect of a fine is so
 that although these parties meant to confirm
 uses and estates, yet they are divested; and
 the old seisin is affirmed, yet that it is de-
 at this is not so: for, secondly, although a fine
 owldgment upon record of a fee simple in
 e, and will, unless controlled by the agree-
 e parties, have a divesting operation; yet its
 is not of that inflexible nature, but that it
 and is controlled by the agreement of the par-
 e purpose of effecting any particular or special
 In support of this proposition, *Puttenham v.*

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(a) 1 *Rep.* 14.(b) 1 *Roll. Ab.* 855.

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Duncombe (a) may be cited: there a fine controlled by the former indenture, which was a fine. So also *Fitz. H. Estoppel*, 211., resolution in *Crommel's* case. (b) *Per Anonymous* (d), are to the same effect. *Thorne* (e), *Earl of Leicester's* case (f), *Brown* (g), shew that it is entirely a question, and that the operation of a fine is to be determined by the agreement of the parties. These cases may be said, are those where a fine, once made, has been held an execution of the power; but they do not shew that it can operate as a power. But there is no real difference between the two cases; for if the displacing and destroying power can be prevented by the object of the parties, why should not the same be prevented by the object of the parties being to create a power, why should not the same be prevented by the object of the parties being to create a power? The innocent intention of the parties is the same in both cases, and that is the intention that the fine is prevented from extinguishing the power. In cases may indeed be found where tenants have incurred forfeiture; but all these cases may be found either to be where there was a power to gain a fee, or where, from their incaution, they intended to declare the uses, the Court have been obliged to presume that intention. *Smithe v. Abell* (h), *Alldredge v. Digges's* case (i), shew this: and in the last case declared by the deed intended to be enrolled, and from the uses declared by the deed by w

(d) 2 Dyer, 157. b.

(e) Moore, 384.

(f) Moore, 615.

(g) Carth. 22. 1 Vent. 368. S. C.

(i) 1 Rep. 110.

(b) 2 Rep.

(d) Skinn.

(f) 1 Fe.

(h) 2 Le.

(i) 1 Rep.

ated to be levied; and, therefore, the two
 e connected together. Cases may be cited,
 o shew that the operation of a fine is so
 when a man makes a will, and afterwards
 the fine is a revocation of the will; but this
 ground, that in order to render a devise
 isin of the deviser must remain unaltered
 ecution of the will till his death. This ex-
 use of *Lutwich v. Milton* (a), unless, indeed,
 e considered as overruled by *Schwyn v. Sel-*
 ut, thirdly, in this case the fines were levied
 rs, and were expressly, and were declared
 urther assurance, and in confirmation of the
 ontained in the settlement. In the case of
Schwyn, the ground of the decision was,
 ole was taken as one conveyance, which
 to the bargain and sale; and *Roe v. Grif-*
 the same effect. And if a person convey by
 lease to the use of himself for life, with re-
 ver, and covenants to levy a fine, and the
 d in a subsequent term, the fine operates to
 uses declared by the deed. This shews that
 ntrollable by the act of the parties. Here
 ot only connected with the deed of covenant,
 n the original settlement, by means of the
 further assurance. Now, if the fine had all
 ng and displacing operation attributed to it,
 t confirm all the prior charges and incum-
 he tenant in tail: it is also equally clear
 tenant in tail conveys his estate to several

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 and Others
 against
 Daunt.

Viner, 133.
Burr. 1952.

(b) 2 *Burr*. 1131.

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uses, in strict settlement, reserving the reversion and then levies a fine to other uses, it operates as a fine to the uses declared by the prior settlement, and the operation to the uses declared of the fine. *Mead.* (a) If that be so, the fine levied by Lady Jersey, even if it had not been expressed in the deed of covenant to be for the corroborating former estates, yet would operate to confirm the covenant. Here the fine was in obedience to, and part of, the covenant for further assurance on the part of the Earl and Lady Jersey; they were the settlors in the deed and the conusors in the fine: one of them was to have the first estate of inheritance; and they were in a situation to give further assurance. *Ferme v. Fermor* (b) is a very strong case for the proposition; there the Court, for the purpose of upholding the lease, serving the estate for years in the lease, according to the strict rules of law, must consider the lease considered merged, held the whole as one estate, and that case was approved and acknowledged by the majority in *Selwyn v. Selwyn*; here the covenant for further assurance so connects the deed of the 21st of 1807, and the fines levied in pursuance thereof, with the original settlement, as to make it one assurance; if it operates as a further assurance, it must, and it does, operate as part of the original assurance; the parties to the settlement might plead this in bar of their documents of the title; and yet it is not so; that which forms actually a part of the title destroys that title. As far as intention goes

(a) 3 Burr. 1703.

(b) Cro. Jac.

the parties never intended to disturb the settlement. Then, if it can operate as a further assurance, consequently, is part of the original assurance, why defeat or divest the seisin? But even if the instrument does not appear on the face of the deed, still the parties intend a rightful rather than a wrongful alienation, particularly so when it is for the benefit of the remainder that the fine should be considered as a further assurance, and as a confirmation rather than a wrongful alienation. *Crommel's* case is one authority to shew that the Court will construe several conveyances as a part of the same assurance, for the effectuating the intention of the parties; and see the case of *Doe v. Whitehead (a)*, Lord Mansfield's judgment puts the question beyond all doubt. If these conveyances be correct and founded in law, it necessarily follows that the seisin under the settlement was not forfeited or divested; and, therefore, the powers of sale and management vested in the trustees were not affected by the conveyances, and if the fines levied by Lord and Lady Jersey do not disturb or divest the seisin, if they did not, it is consistent with the estate, if no forfeiture was incurred by them, it is scarcely possible to conceive that the power or right in Lord and Lady Jersey to request or direct a sale can be destroyed or suspended. But if it be that Lord and Lady Jersey did an act inconsistent with the estate, that they incurred a forfeiture, and the fines levied by them displaced and divested the seisin; yet there is ground to contend that their power of requesting or directing will not be affected by the forfeiture. The power of requesting and directing

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(a) 2 Burr. 704.

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is not annexed to any estate given to the tenant for life, but is a personal confidence given to the trustees, to whom the power is given, and for the convenience and interest of the parties interested under the settlement. The exercise of the power, in exercising and preserving this power, as well as in the uses and trusts, is clearly and unequivocally expressed in the deed; and if it were not so, yet the contrary, would be to presume that Lord Jersey meant to destroy a power which was given to their interests, but which cannot prejudice them without their own consent. The universal and constant practice of conveyancers in favour of this view of the question; *Doe dem. Lord Jersey*, in error (a), the majority of the conveyancers was much relied upon. Under the deed the plaintiffs are entitled to the judgment.

Cooté, contra. As to the first point submitted, that the cases cited on the other side are sufficient to establish, that when the tenant for life with the immediate remainder-man in fee simple, the forfeiture takes place; but those cases are not applicable in their circumstances to the present case. *v. Blizard* (b), which is the only case where there was, as here, an intermediate estate, the levy was decided to be a forfeiture. That case was cited several times; and the Court took the distinction between a fine and a recovery, viz. that a fine operates on parts of an estate, but on the whole, so, it necessarily followed, that all the

(a) 2 Brod. & B. 473.

(b) 1 Roll.

divested and turned to a right. It is laid
Buc. Abr. 194. tit. *Fine*, and in *Hunt v.*
 that a fine must convey a fee simple, unless
 acknowledgment of the parties qualify it.
 therefore, must put their intention on the
 otherwise they will create for themselves a
 And this is necessary, to prevent the
 this powerful assurance from turning it
Smith v. Clyfford, and *Roper v. Halifax*,
 been cited on the other side, are both cases
 y. Now, a recovery may operate upon
 parts of the estate, but a fine cannot do so.
 of the decision in *Smith v. Clyfford* was,
 a question, whether it was a forfeiture
 statute of *Elizabeth*, which the Court held
 to a bare tenant for life; and they thought
 re, inasmuch as the recovery had a legal
 rk upon, viz. the ultimate remainder in tail,
 over the intermediate estates tail: but the
 a fine is very different. In *Roper v. Hali-*
 ant conveyed away the estate to trustees
 joint lives of herself and her husband, to
 a year pin-money; remainder to the use of
 for life; remainder to herself for life, and
 nders over; leaving the reversion of her old
 self, in order to support the powers: and
 bsequent instrument was an innocent con-
 d contained an express reservation of the
 hat case, therefore, has nothing to do with
 The result of all the authorities proves,
 ect of this fine is to produce a forfeiture.

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(a) 1 Salk. 341.

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But it is contended by the other side, that the operation may be controlled by the agreement of the parties, for effecting any particular or other purpose. If that agreement appears in the concord, it is so, but not otherwise. Such an agreement may be binding on the parties to the fine, but not on the case put, upon third parties; and, if the fine is not contained in the record, the remainder-man may enter for a forfeiture. No case has been cited to which this observation will not be applicable. Suppose tenant for life levies a fine, and declares the uses of it, but not on the record, having a secret intention to gain a wrongful fee; if the remainder-man brings ejectment, and the deed and the uses were produced on the trial, and it appeared that the fine came into existence, would that be a defence? If so, the remainder-man might run no risk: he might declare the secret instrument, to be produced, if not, to be destroyed, as soon as it is produced, and the remainder-man to enter; or he may examine the parties, and produce, ultimately, whichever would be most advantageous to him. All this is consistent with the holding that the agreement must be put on the record, and that, if on the record he makes a declaration of the uses of the fine, it will amount to a confirmation of his estate. In *Puttenham v. Duncombe*, the instruments were dated on the same day, and therefore, formed but one assurance. Besides, the land was seised in fee, and no question of forfeiture.

and there it was not a question with a third which makes all the difference. In *Cromwell's* *Blunt* being seised either in fee or in tail of the conveyed it to *Andrews*, with a covenant to levy and with a condition of re-entry, if *Andrews* re-convey the advowson to *Blunt*; a fine was our grant and render; and *Andrews* having died re-conveying, *Blunt* re-entered. There it was that the fine did not operate to prevent him, for there was one assurance; but there, the interest of persons was not involved. The same answer given to *Perrot's* case, and *Anonymous*. (a) Other cases cited on this point are either cases under peculiar circumstances, and, with one exception, not cases of forfeiture, or cases where it has been held, that fines levied in execution of a power do not destroy it; and it is contended, that there is no difference between a fine in execution and in confirmation of a power. In the Earl of *Leicester's* case it was held that the Court might have held that the deed whereby he covenanted to levy the fine to other uses was a revocation of the former use; besides, no forfeiture was then involved. In *Bullock v. Thorne* the fine was levied by the tenant in tail, and, consequently, not wrongful; besides, the case fell within 27 *Eliz.* as to voluntary conveyances. The only part of the law applicable to the present is a dictum at the time which was not necessary to the decision. The case of *King v. Brown* was decided first in the King's Bench, where it was held, that the power was destroyed by the fine subsequently levied. This decision was

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(a) *Skin.* 238.

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afterwards overruled in the Exchequer Chamber. Judges to two; but one of the six decides on the ground, that, though the power was destroyed by the party claiming was barred, because his ancestor was not a conusee of the fine. That case, therefore, is not a good one where the rights of third parties are introduced. The result is, then, that in the cases it is generally laid down, that a fine by tenant for life is not a bar to a recovery in fee, and that he cannot relieve himself from the operation of any agreement not introduced upon the record. But, thirdly, it has been argued, that the cases in this case were, and were declared to be for the purpose of assurance, and in confirmation of the prior estate obtained in the marriage-settlement, and that the Earl of Jersey and Lady Jersey were in a condition to give effect to the assurance, and were bound so to do. If, indeed, the deeds executed, and the fines levied in 1806, were intended to put into effect the articles entered into before marriage, they may be considered as one assurance with those of 1807. The argument is at an end. But that cannot be so, if the deeds and fines in 1806, together, make one assurance, and perfect assurance: and those in 1807 were intended for a very purpose of making alterations therein; and so, they cannot form one assurance together. In *Selwyn (a)* was the case of a recovery, and does not apply, unless it can be shown that there is no difference between a fine and a recovery in this respect. It is argued, indeed, that *Lutwich v. Mitton* was the case of a fine, was overruled by it; and that the two cases go on very different principles. In *Griffiths and Others*, the ground of the decision

(a) 4 Burr. 1952.

the testator had the reversion in fee in him, which was not affected at all by his admission under the surmount to the uses contained in his marriage-settlement. In this case, therefore, nor *Goodright v. Mead*, *Warrers and Curson v. Fermor and Others*, are applicable to the present. But the case of *Doe v. Whit-* (1) is a strong authority. There Lord Mansfield held that if you could distinguish the conveyance, suppose *Timothy Stoughton* to have been only tenant in fee, at the time of his levying the fine, it would be a forfeiture of his estate for life; and he afterwards, in deciding the case, says, "I look upon all this as one assurance. If they were distinct conveyances or assurances, this fine would be a forfeiture of his estate under the new settlement." This, therefore, is an authority to shew that if the assurances are in this nature, the fine operates to produce a forfeiture. Now how is it possible to consider the whole in this case as one assurance? Here, the first deed, after limiting the estate in a different manner, according as either the testator or Lady Jersey might happen to survive, conferred a power of appointment by Lady Jersey, limited, however, to persons related to her by blood or consanguinity; but the second deeds give her an absolute power of appointment, without any such limit. They are, therefore, so far, at least, in discordance with the first, and cannot, independently of the interval of time, and the other circumstances before alluded to, be considered as forming one assurance. If these general principles be allowed, it must follow that this power of appointment, and Lady Jersey, to request and direct a sale, is

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at an end. It is a component part of the sale and exchange; a power appendant, the life estates, and a power in gross, and those in reversion. It was, therefore, excluded from the operation of the fine. *King v. Melling* (a), *v. Slater* (b), and *Digges's case* (c), are to the point. As to the practice of conveyances, as has been mentioned, it is not uniform in this country; there is not any authority for the Court. It may be a construction contended for by the defence, but it is not deductive of hardship; but if parties will come into a conveyance in this manner, they must take the consequences, and must not leave others to ascertain the secret conveyances, their intention. They must state their intention in the concord of the fine, and no room for doubt will be left.

The following certificate was afterwards

We have heard this case argued by the counsel, and have considered it; and we are of opinion that the fines levied by the Earl and Countess of Jersey, as of *Trinity* term, 1807, did not operate to destroy, or suspend the right or power of the Earl and Countess, and the survivor of them, to rectify a sale or exchange of the settled estate, and the powers for that purpose contained in the settlement, so as to prevent an exercise of the powers by the trustees of the settlement.

C.

J. D.

J. S.

(a) 1 *Ventr.* 225.(b) *Hardr.* 410.

(c)

1822.

JOHN HATFIELD *against* JAMES THORP.

following case was sent by the Master of the
rolls for the opinion of this Court.

John Steemson was, at the respective times of making
his will and of his death, seised in fee simple of a free-
messuage, house, and garden, situate at *Newark*,
county of *Nottingham*; and being so seised, made
his will in writing, bearing date the 18th of *Novem-*
ber 1779, and thereby devised to his daughter,
Mary Bell, "All that his messuage, house, and garden,
situate at *Newark* aforesaid; and at his daughter *Mary Bell's*
messuage and appurtenances to his daughter
Mary Bell and her heirs, for ever. The said
John Steemson signed and published his will in the pre-
sence of *Ann Hill*, *Samuel Leonard*, and *Thomas Hat-*
field who respectively attested the same in his presence,
in the presence of each other. *Thomas Hatfield*, one
of the attesting witnesses to the will, was, at the time of
his death, the husband of the said *Elizabeth Hat-*
field the daughter of the testator. *John Steemson* died
after making his will, without having altered or
revoked the same, leaving the said *Mary Bell*, *Elizabeth*
Hatfield, and *Thomas Hatfield*, surviving him. *Elizabeth*
Hatfield died on the 9th of *April*, 1813, in the lifetime
of *Mary Bell*, without having done any act to dispose
of her interest (if any) which she took under the will
of *John Steemson*, leaving *Thomas Hatfield*, her husband,
the plaintiff; *John Hatfield*, her eldest son and heir-
at-law surviving her. *Thomas Hatfield* died in *January*,

An estate in
fee, upon the
determination
of a life estate,
was devised to
the wife of
A. B.: *A. B.*
was one of the
attesting wit-
nesses to the
will. The tes-
tator died in
1779, and the
wife of *A. B.*
died in 1813,
before the pre-
vious life estate
was determin-
ed: Held,
that *A. B.* was
not a good at-
testing witness
to this will.

1819,

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1819, and *Mary Bell* on the 10th day of A. The question for the opinion of this Court was whether the will of *John Steemson* was to pass any, and what estate, in the messuages and premises at *Newark*, to *Elizabeth Hatfield*

Cockerill, for the plaintiff. *Thomas Hatfield* witness upon whose attestation this question was a credible witness, within the meaning of the statute; and this will was therefore duly attested to pass the real estate. There are conflicting authorities upon the question, whether the interest renders the attesting witness to a will incompetent at the time of the attestation, or whether when his testimony is required. In *Holden v. demise of Anstey v. Dowsing (a)*, 19 G. 2., who took under a will an annuity charged on real estate devised, was held not to be a competent witness, within the meaning of the statute; Chief Justice *Lee*, in delivering the opinion of the Court, argued as if the objection of benefiting the witness, at the time of subscribing the will, could be removed or be taken off by any subsequent event. In that case, however, the witness had an interest in the real estate at the time of the trial. That decision occasioned the amendment of the stat. 25 G. 2. c. 6., which, however, applied only to wills made after the 24th June, 1752. In *Chetwynd (b)*, 31 G. 2., a similar question arose. The testator, in that case, died in 1750, leaving a will which he charged his real estate with the payment of his debts and legacies, attested by his two attesting witnesses, an apothecary, he being indebted to each of them

(a) 2 Str. 1253.

(b) 1 Burr. 414.

the attestation, for their professional services. Several debts were paid before the day when the will was tried, when their testimony was required to prove the will, and the Court of King's Bench were of opinion that the will was duly attested. So also in *Stycesbury's* case, there cited, the testator had left a charge on his lands to three servants, who were named in his will; they released the legacies before examination, and it was held that the will was duly attested. In *Baugh v. Holloway* (a), Sir Robert Ray- mond, in his argument, lays it down as a clear position, that a trustee of money releases the legacy, he is a good witness to the will. In *Hindeson v. Kersey* (b), the testator made a will in 1734, devised his lands to trustees, to pay the rents and profits to poor orphans, and to impotent people, within a particular township. The will was attested by two of the trustees, who, at the time of attestation, and of the testator's death, were in possession of the tenements in the township, for which they paid the rent. Before the day of trial, they released their interest to the other trustees, and conveyed their interest within the township to other persons. The Court were of opinion, that the will was duly attested to pass the real estate; but Lord Camden dissented, and delivered an elaborate judgment in support of his opinion. The weight of authority, therefore, is in favour of the proposition, that a party having an interest at the time of attestation, but who discharges his interest previously to his examination, is to be considered a credible witness, within the meaning of the Statute of frauds; and that being so, if *Thomas Hatfield*,

1822.

HATFIELD
against
THORP.

(a) *Peere Will.* 557.

(b) 4 *Burn's Ecc. Law.* 97.

the

1822.

HARRIS
against
THORP.

the husband of *Elizabeth Hatfield*, had been called upon to prove the will, and were called upon to prove the will, competent witness: for, in the events that happened he derives no benefit whatever from the will for his wife having died before the life of *Bell* was determined, he was never seised of his wife; and she never having been in possession, he did not, upon her death, become entitled to the curtesy. But assuming that *Thomas* derived such benefit by this will as, before the statute, would have rendered him an incompetent witness, and therefore, that before that statute, the devise to *Elizabeth Hatfield* but the will would have been void, that statute restores his competency and re-establishes the will. By the 1st section of the statute "That if any person shall attest the execution of a will, to whom any beneficial devise, legacy, or gift of or affecting any real or personal estate, or charges on lands for payment of debts, shall be given, such devise, &c. shall, so far as respects such person attesting the execution of such will, be utterly void, and such person shall be admitted as a competent witness to the execution of such will or codicil." The object of the statute was to restore the competency of the attesting witness in all cases of benefit derived under the will, and to avoid the will where the person attesting the execution of the will was a person claiming under him; and since the statute, therefore, no will can be void by reason of the benefit arising under it to the attesting witness, as to the interest of such witness, or any person claiming under him. This will, therefore, is well

plaintiff does not claim under the attesting
 e is entitled to an estate in fee simple in the
 ession.

1832.

Harvard
 Library
 Thos.

contrá. This will was not duly attested so as
 e real estate, and, consequently, *Elizabeth Flat-*
 po estate in the devise to her, for *Thomas*
 cannot be considered a credible witness within
 of the 29 Car. 2. c. 3. It is clear that he
 have been a competent witness to prove the
 of the lifetime of his wife, for he would have
 in right of his wife, in the estate which she
 the will; they might have sold their interest
 ate, and the money arising out of such sale
 belonged to the husband. Besides, if *Mary*
 died in the lifetime of *Thomas* and *Elizabeth*
 he would have been seized during the life of
 and in case of surviving her, he would have
 at by the curtesy; he would therefore have
 t in supporting the will, and could not be a
 or credible witness to prove it. The case of
Jennings (a) is an authority to shew that a
 not a good witness to a will under which he
 interest. The decision in that case proceeded
 ound that the will was void, quoad the devise
 ecause he took an interest under it, and *Hold-*
stacy v. Donsing (b) is an authority precisely
 o shew, that *Thomas Flatfield* was not a credible
 within the meaning of the statute. It is true
 are authorities to shew, that the competency

Cartho, 514.

(b) 2 Str. 1255.

1822.

HAYFIELD
against
Trotter.

of a person interested at the time of the attestation, cannot be restored by a release, payment, or extinction of all his interest, so as to admit him to probate of the will. In this case, however, the husband takes an interest in right of his wife, derived from the will, which she took under the will, and he could not extinguish that interest, for he could not destroy the estate without her consent. As long as she survives, therefore, he would have an interest in the estate, and his wife, incapable of being extinguished. The statute of the 25 Geo. 2, c. 6, s. 1. applies only to the interest taken under the will is destroyed by the statute itself. It enacts, that the devise, bequest, or interest, so far only as concerns such person, in relation to the execution of the will, shall be null and void, if the attesting witness does not take any share or interest under the will, as the statute renders the will void; the husband, in fact, takes no estate or interest whatever under the will; his wife, indeed, takes an estate under the will, and, by operation of the statute, her right of his wife, derives a beneficial interest in the estate. The estate of the wife is not destroyed by the statute, and, consequently, the derivative interest which the husband takes in that estate, in right of his wife only, is not extinguished. Then it is a case within the stat. 25 Geo. 2, c. 6, s. 1. that the husband has an interest, not only at the time of the attestation, but an interest continuing from the time of the execution of the will in 1779, till the death of his wife, in 1811, at all which time he would not have been a credible witness to prove the execution of the will. Independently of the question of interest, it is a

at a husband and wife cannot, in any case be a
for each other. *Davis v. Dimwoody.* (a)

Will, in reply. The husband might have extin-
all his interest in the wife's estate, by releasing
ts and profits during his life, and he might,
e, have made himself a competent witness to
he will, immediately after the death of the tes-

Court afterwards sent the following certificate.

case has been argued before us; and we are of
that the will of the said *John Steemson* was not
ecuted, so as to pass any real estate in the mes-
garden, and premises to *Elizabeth Hatfield*.

C. ABBOTT.

G. S. HOLROYD.

W. D. BEST.

(a) 4 T. R. 678.

REX against WILLIAMS.

le nisi had been obtained for filing a criminal
ormation against the defendant for an alleged
on the clergy of the diocese of *Durham*. The
on stated, that upon the death of her late ma-
ne of the bells in the several churches at *Durham*
ed. It ascribed this omission to the clergy, and
ceeded to make some very severe observations
body. The rule was obtained upon affidavits,

R r 2

stating

1822.

STANTON
HARRISON
TUCKER.

Wednesday,
April 24th.

The Court will
grant a criminal
information for
a libel upon a
public body of
men upon an
affidavit, stating
the publication
of the libel by
the defendant.

1822.

The King
against
WILLIAMS.

stating the purchase of the newspaper, con-
libel, and that the defendant was the proprie-
liar of the paper. To establish the purchase of
Borougham and Carter now shewed cause,
that the Court would not grant a criminal
for a public libel, upon the application of a
private prosecutor, and without any affidavit
charge being untrue.

Scarlett and Tindal, contra. The Court
many instances, granted informations for
number of individuals, without requiring any
the falsehood of the charge. In *Michaelmas*
1739, such an information was granted ag-
now, the printer of the *Daily Advertiser*, for
a libel against the Directors of the *East India*
and this application was supported by affidavits
the purchase of the newspaper, and an affidavit
by the defendant that he had printed it.
term, 28 Geo. 2. 1755, a similar information
granted against *A. Alderton*, for writing and
a libel on the justices of the peace for the
Suffolk, in an advertisement respecting the
of money in the hands of the county treasurer.
only affidavit in support of the application
the printer of the newspaper, that he had
advertisement from the defendant for publi-
in Hilary term, 18 Geo. 3. such an information
granted against *R. Holloway* and *Gov. Allen*,
and publishing a libel upon the justices of
the county of *Middlesex*, equally attested by
Lichfield-street, in a pamphlet entitled *The*

them with ignorance and corruption in the
of their office. This rule was granted upon
it, stating the purchase of the pamphlet from
the defendants, and that the other acknowledged
to be the author, and that several gentlemen
hadly int by reason as justices at a public
dish told street. It is clear too, from the
of the Court, that the Court
a criminal information for a libel reflecting on
body.

The Court. The Court. Rule absolute.

See this case also in a note in 2 *Spence, Rep.* 505.

1. In the case of *Dixon against Reid*, the Court
was divided 4 to 3 in favor of the plaintiff.

Dixon against Reid. Thursday,
April 25th

ON upon a policy of insurance on ship and
at and from *Sierra Leone* to a port of dis-

Great Britain: 2000*l.* upon ship and 3000*l.*
cargo, valuing wood at 12*l.* per load. The

on the trial of the cause, at the *London* sit-
last *Michaelmas* term, had obtained a verdict

loss by barcetry, and the underwriters, upon
of execution, paid as for a total loss. A rule

been obtained, calling on the plaintiff to show
the underwriters should not be allowed the

which that part of the cargo which arrived in
had been valued by the policy, subject to the

thereon, together with the sum paid out of the
of the ship and cargo at *Batavia* for wages

why so much as the said two sums should
amount

1832.

THE KING
against
WHIGGERS.

Thursday,
April 25th

Where a ship
and cargo was
barbarously
taken out of her
course by the
crew, and the
ship and part of
the cargo sold,
and the remain-
der sent home
by another ves-
sel: Held, that
this was a total
loss of the car-
go from the
time of the
committing of
the act of bar-
cetry.

1892.

1892.
1892.
1892.

amount to, should not be paid back by the underwriters, out of the money paid over why, in default thereof, the consolidation be opened and a further trial be had. The now appeared upon the affidavits. The on board, at *Sierra Leone*, 233 logs of about 200 loads, and sailed from thence on the 5th March, 1820, but was barred the crew to *Barbadoes*, where she arrived April, and the ship was condemned and logs of timber were also sold, to pay the incurred there, and the remaining 186 logs to *London* by another vessel, which arrived 1820. The insured abandoned to the Upon the arrival of the 186 logs in the market price of timber being then 10% of the plaintiff proposed to settle the loss upon the cargo at 69% 9s. 6d. per cent. The not consenting to it at that time, the timber afterwards fell, and the 186 logs 27th April, 1821, sold, (but not by the rate of about 6% per load; and the loss of the underwriters on the cargo, amounted per cent.

Scarlett and *F. Pollock* now shewed question is, whether, upon the facts proved be considered a total loss, with benefit merely an average loss. If it was a loss description, the plaintiffs can only recover the damage they have sustained by the loss of *Barbadoes*. If, on the other hand, it be with benefit of salvage, then the plaintiffs

the sum which the underwriters have actually
 they were then stopped by the Court.

Factor-General and Puller, contra. This was
 average loss.

It is quite clear, that if the ship

driven out of her course by tempestuous

Barbaulds, and had been there condemned

and a part of the cargo also sold, and the rest

and the voyage, as to the latter part,

starded, that would have been only an average

total loss. *Glennie v. London Assurance Com-*

Anderson v. Wallis. (b) *Hunt v. The Royal*

Assurance Company. (c) In the latter case it

ly held, that a loss of voyage for the season

ils of the sea, was not a ground of abandon-

a policy on goods, with a clause of warranty,

average, where the cargo is in safety, and not

able nature as to make the loss of the voyage

the commodity. Now here, the commodity

a perishable nature; it was not deteriorated

y any of the perils insured against, but merely

of price, for which the underwriters are not

can make no difference, whether the ship be

n her voyage by the perils of the sea, or by

ry of the master or mariners; the underwriter

presbly insured against this description of

question is whether, upon the facts proved,

to attend a total loss, with benefit of

C. J. I am of opinion, that this is a case

loss, with benefit of salvage. The case is

tinguishable from all the cases which have

It is on the other hand, it is

1 M. & S. 371. (b) 2 M. & S. 240. (c) 5 M. & S. 47.

1822.

 Dixon
 against
 R. 119.

1827.

Dyson
v.
Another

been cited in argument, where the ship
- out of her course by the perils of the
voyage thereby retarded. In those cases,
during the whole time, in the possession
- Here by the fraud and barratry of the
- liners, the cargo was taken out of the pos-
- sessed. From that time it became to the
- The payment of the wages at Barbadoes,
- home the 186 logs, were not acts of
- of any person authorised by them. It
- that this was a total and not an average
- sequently, this rule must be discharged.

Rule

(4) *The Tallant v. Riddle*, 2 M. & S. 256 is con-
- sidered as authority for the rule in *Dyson* and *Another* against C.

Friday,
April 26th.

The contractors
for making a
navigable canal
having, with
the permission
of the owner of
the soil, erected
a dam of earth
and wood
upon his
close, across a
stream there,
for the purpose
of completing
their work, have
a possession
sufficient to en-
title them to
maintain tres-
pass against a
wrong doer.

TRESPASS for breaking and entering
- or watercourse, belonging to the pl-
- county of Sussex, and breaking down
- plaintiff, then being in and across the
- or watercourse belonging to
- which out of watercourse led from the
- closes of meadow-land near to a certain
- of a canal, which the plaintiffs were then
- a contract made by them with the cor-
- of the *Permanence and Amelioration* of
- of the 5th Act for making
- canal from the river *Tadwiler* into the *Chichester*
- and from thence to *Lindisfarne* and *Portsmouth*

with a cut or branch from *Hinton* common to
of *Chichester* dike by means of which said break-
in the said dam the water rushed and flowed
at force from the river *Lea* into the said
watercourse and the said closes of meadow-
the said cut or branch so making or nearly
ed, and forced a great quantity of the said
meadow land into the said cut or branch,
ke down thirty yards of the said cut or branch,
ed up the same, which said quantity of soil so
into the said cut or branch, the plaintiffs under
contract, were bound to remove. Plea, not guilty.
trial before *Wood B.* at the last assizes for
ty of *Sussex*, the only question of law was, whe-
plaintiffs had such an interest in the bank in
as to entitle them to maintain trespass. It
d that the plaintiffs had entered into a contract
e company of proprietors of the *Portsmouth*
ould navigation for forming a canal (land, in
se of performing their contract, in making the
from *Hinton* common, in *February, 1822*, had
a dam upon the land in question by permission of
er of the soil. The dam was six feet thick, and
lve feet across, and was formed of earth and
piles. It had been originally made in *January*,
between that time and *December* it had been re-
y the plaintiffs. A verdict being then found
plaintiffs, which the plaintiffs were
a contract made by them with the com-
y *Scriven* authorized for a rule to be entered
uniform rule that said defendant should be
s had no such interest as to enable them to
n trespass. They had constructed the dam on
the

1822.

Drum
Knot
Cotton.

The contract of
for making a
navigable canal
having with
the permission
of the owner
of the soil, re-
ferred to make
a boom and
upon the
close, across a
stream there,
for the purpose
of completing
their work, have
a possession
of the land to
enable them to
maintain their
possession of
each piece

1822.

DICK
MAN
COTTER.

the soil of another, and by his permission ;
 continuation of the soil from one bank of the
 to another ; it consisted of earth which on
 the adjacent soil ; and the bank, there
 the property of the owner of the adjoining
Gallie on Sewers, p. 74. fourth edition, it is
 1840 wall doth differ in point of ownership
 first, in respect of the materials the owner
 for a bank is made *ex solo et fundo quæ an-
 tiquis sunt eadem cum terra super qua edific-
 is not a wall, for it is an artificial edifice
 materials arising of the place where it
 which he brought thither, and built there
onus et costæ pars : so that the owner
 party of a wall doth appertain to him who
 repair the same, though his ground lie not
 to ; but of a bank, the property and down
 whose ground adjoin thereto." And this was
 good law by the Court of Common Pleas
 of *Newcastle v. Clarke (a)*, where it was held
 commissioners of sewers could not maintain
 against commissioners of a harbour for breach
 a dam erected by the former, as such was
 across a navigable river, as the authority to
 by them, on behalf of the public, does not
 such a property, or possessory-interest, as
 them to maintain such action.*

Per Curiam. The dam was erected by the
 their own expense, and with their own materials
 the locus in quo, with the consent of the commissioners

(a) 2 B. Moore, 666.

a special purpose. Until that purpose was completed the plaintiffs were entitled to the possession of the land. Now, it is perfectly clear that the person in possession of property, whether rightfully or wrongfully, cannot maintain trespass against a mere wrong-doer. In *Leake v. Mitchell* they had any other than a partial or subordinate interest in the land, trespass is the only proper remedy. This case is distinguishable from that of *The Newcastle v. Clarke*, for there the commissioners had no possession, but had a mere right to enter on the locus in quo, and to do certain acts. In *Nash (a)*, the posts were put upon the lands of the defendant without his permission; and yet it was held, that the plaintiff who put them there might recover in trespass. In *Leake v. Mitchell* they were put there where the general issue only was raised. Now, that could be only on the ground that the land was the property of the plaintiff; for if it was not so, it would have been a good defence to the action.

Rule refused.

(a) 8 East, 394.

1822.

Printed
by
G. G. & Co.

1828

PARRIDGE
v.
BERESaturday,
April 27th.A mortgagor
in possession of
the premises
mortgaged, is
tenant to the
mortgagee.

who has the legal title vested in him.
therefore is a tenant within the strictest
word.

(a) Rule refused.

PARRIDGE against BERE.

the mortgagee of the land is in possession of the
land, and in the mortgage, there must subsist

ACTION for diverting a water course.

action contained an averment, that a
was in the possession and occupation of one
as tenant thereof to the plaintiff, the reversion
to the plaintiff. At the trial before Park

assizes for the county of Devon, it appeared

being tenant for life of the close mentioned

claration, in March 1817, had mortgaged

the plaintiff for 100l. for a term of years,

Turner, lived so long, and that Turner

time continued in possession and paid the

was objected on the part of the defendant

relation of landlord and tenant did not subsist

a mortgagor and mortgagee, and consequently

averment was not supported by evidence

Judge over-ruled the objection; and now

Adam moved for a new trial, and contended

there was no tenancy, there was no payment

bill of interest; and he relied on the opinion

in *Birch v. Wright*. (a)

to any possession may be considered to

Per Curiam. Here the mortgagor was

possession of the mortgaged premises, by

mortgagee, who has the legal title vested in him. He, therefore, is a tenant within the strictest meaning of that word.

Rule refused. (a)

When the mortgagor or his heir is in possession of the legal ownership is in the mortgagee, there must subsist between the parties, or otherwise the mortgagee holds in fee, and as disseisors; for the law of England recognizes possession independent of a tenancy, either to the lord paramount or the lord. If, in the mortgage deed, there is the usual provision for the redemption of the land by the mortgagor, and his heir, assigns, &c., and the mortgagor is in actual possession, he may, nevertheless, be regarded as tenant for years to the mortgagee, for the continuance of the agreement; *Powsey v. Blackman* (a); and, during the agreement, his legal interest devolves on his assigns, so, during the remainder of the agreement, are trustees for the mortgagee. If, in the case of such agreement, the money is repaid at the appointed time, and the mortgagor continues in possession until the termination of the agreement, without any fresh agreement between the parties, he is, until payment of interest, or other recognition of the mortgage by sufferance, for he came in by a rightful title, although he may have wrongfully. If the mortgage deed contains no such agreement, the mortgagor remains the actual occupant with the consent of the mortgagee, he is strictly tenant at will. *Keech v. Hall*. (b) If, in any instance, the mortgage is transferred to another, without the consent of the mortgagor, the tenancy at will is determined, and the mortgagor becomes tenant, by sufferance, to the assignee, until the payment of interest or other recognition of tenancy; and in all cases the mortgagor can be considered tenant at will, the death of himself or of the mortgagee must determine the tenancy. If the mortgage is determined by the death of the latter, the mortgagor will be tenant, at will, to the representative of the mortgagee, until payment of the principal, or other recognition of tenancy, and afterwards tenant at will. If the mortgage is determined by the death of the mortgagor, and his heir or devisee enters without any recognition of the mortgagee's title by payment of interest or other act, an adverse possession may be considered to have commenced. *Per Holt in Smart v. Williams*. (c) In every case in which an adverse possession exists between the parties, and even where an action commences, as by the entry of the heir or devisee of the

Jac. 659.

(b) 1 Doug. 22.

See 587, & 1 Salk. 245. *Thompson v. Belcher*, 3 East, 449.

1892.

**Plaintiff's
debt
Bills.**

mortgagee without the consent of the mortgagee, the payee is a recognition of the title of the mortgagee, and evidence that the mortgagor, or person deriving title from him, will, and a strict tenancy at will commenced. *Holland v. the land is in the occupation of tenants, and the mortgagee to receive the rents, he has been considered to be a mortgagee, Moss v. Gallimore (b), but without liability to a* *Law of Mortgage, p. 327, 8.*

(a) *Cork. 414. & 10 Vin. Ab. 418. pl. 19.*

(b) *1 Doug. 283. Vide Ex parte Wilson, 2 Ves. & Bea.*

*Saturday,
April 27th.*

LAMPON the younger against C

A deed containing a general release of all debts, &c., recited that the releasee had previously agreed to pay to the releasor the sum of 40*l.* for the possession of certain premises, and that in "consideration of the said sum of 40*l.* being now so paid as hereinbefore is mentioned," and also in consideration of the sum of 10*s.* a piece, well and truly paid to the said releasor and J. S., the receipt of which said several

sums of money they did thereby acknowledge, did release, &c. There was for the sum of 40*l.* indorsed on the release. But it appeared on action for this sum that, in fact, it had never been paid: Held, that this deed of estoppel, inasmuch as the general words of release were qualified by the stated only an agreement to pay, and not an actual payment of the sum.

ASSUMPSIT against the defendant, and of the following promissory note, dated April 11th, 1821, "Two months after date to pay Mr. Thomas Lampon, junior, or order of 40*l.*, value received this day, in things of Mr. Donbell, and in having possession given the premises lately held under me by Thomas senior, afterwards by the sheriff." The declaration, also, counts for goods sold and delivered the usual money counts. Plea, general issue. Trial, at the last London sittings, before Alder appeared, that the defendant was the landlord of the premises occupied by the plaintiff's father, the plaintiff having taken possession of the premises and crops growing thereon, under a writ of execution.

the defendant, in order to get possession of
lands and crops, gave the note in question, which,
originally signed by him, did not contain the
words "or order." These words were inserted on the
11th April, 1821, without his knowledge. Under these
circumstances, the Lord Chief Justice thought the count
on the note could not be sustained, and the plaintiff
succeeded on the other counts in the declaration.
The defendant, in answer to the plaintiff's case, put in
a plea executed by the plaintiff, dated 14th April, 1821,
in which he alleged that *Thomas Lampon* the elder, was in
possession of certain Hereditaments and premises, as
to which the defendant, but which tenancy would have
terminated on the 29th day of September, 1821, had it not
otherwise determined; and that the plaintiff had
obtained a judgment against the said *Thomas Lampon*
the elder, for the sum of 450*l.*, besides costs of suit;
and that upon all the estate, term, and interest of the
said *Thomas Lampon* the elder, of and in the said here-
ditaments and premises, together with the crops growing
thereon, were taken in execution, by virtue of a writ of
fieri facias, and the warrant grounded thereon, at the
instance of the plaintiff; and that the defendant, being de-
ficient in obtaining possession of the premises, applied
to the plaintiff, and prevailed on, the plaintiff, as such judgment,
to give him possession of the same, which the
plaintiff accordingly did, on the 11th day of April,
1821, whereupon the said defendant, having then agreed to pay
the plaintiff the sum of 40*l.* for such possession; and
the defendant had requested the said *Thomas*
the elder and the plaintiff, to execute an assign-
ment of all their estate, title, and interest in the said
hereditaments, which they had agreed to do; and then
proceeded

1821

~~Lampon~~
~~vs~~
~~Conner~~

1852.

Lamson
v.
Lamson

proceeded to state, that, in pursuance of
 ment, "and in consideration of the said sum
 now so paid to the plaintiff, as hereinbefore is
 and also, in consideration of the sum of 10
 the said Thomas Lamson the elder and the
 hand well and truly paid by the defendant,
 before the execution of those presents; the
 which said several sums of money they do
 and, respectively, acknowledge and from this
 respectively and every part thereof did there
 and, respectively release the defendant, and
 the plaintiff bargained, sold, like, and
 the elder bargained, sold, ratified, and
 the defendant, his heirs, &c. all the mesuage
 ments, &c. and it was further stated, that
 siderations thereinbefore mentioned, and also
 of 10s. to the plaintiff, in hand paid by the
 immediately before the execution of those
 receipt whereof was thereby acknowledged,
 tiff, generally released the defendant, his heirs,
 all dues, sums, claims, and demands whatso
 law, and in equity. There was also indorsed
 a receipt by the plaintiff for the sum of 10s.,
 14th, 1821. The Lord Chief Justice thought
 not a sufficient answer to the plaintiff's averment
 clearly proved and admitted, that, in fact,
 40s. above mentioned, had never been paid.
 The plaintiff accordingly had a reading made
 of the receipt to the jury, who returned a verdict
 for the plaintiff, by leave of the Lord Chief Justice.
 The plaintiff's counsel then moved for a writ of
 error, to the plaintiff's damages, and it was
 allowed, after an admission by counsel for the

1822
Lenny
Coke

Y.

1892.

—
LAWSON
against
Coxs.

mentioned immediately before. And b
the deed, the whole becomes intelligible,
with the justice of the case, and the o
of the parties. I think, therefore, tha
of this deed was not to release this sum,
release, though in general terms, must
the previous recital. The verdict is, th

BAYLEY J. The true question is, v
any thing in this deed which clearly
sum of 40*l.* has been paid to the plaint
by a security, but in money. It mus
admitted, that this release would have
equally to the action on the note, if
remained unaltered. Then, are the wor
leave no doubt? It first recites, that t
agreed to be paid. The recital does n
in addition to this, that the 40*l.* had
when we come to the operative part, v
that, "in consideration of the sum of
so paid, as hereinbefore is mentioned,"
words "so paid," and "as hereinbefor
obviously do not refer to a new payme
former payment, mentioned in the deed.
look back, we find no actual payment t
only an agreement to pay. The wor
therefore, are ambiguous; and let us
whether there was an actual payment o
the facts stated, there is no doubt as to t
Court is not, therefore, prevented from
ing to what appears plainly the justice
although the note, as a security, is inval
for which it was given, not being paid, r
to the plaintiff.

BYD J. The plaintiff is entitled to our judgment, unless he is estopped, either by the deed of release or receipt indorsed on it. As to the latter, it is to observe, that, not being under seal, it cannot amount to an estoppel; but can only be evidence, if any, capable of being rebutted by the other circumstances in the case. And, if so, then, as it is admitted that no such payment has actually been made, the receipt becomes of no importance. As to the deed, it is to me to depend on the construction to be given to the words already referred to, "In consideration of a sum of 40*l.* being now so paid, as hereinbefore mentioned." If the deed had absolutely stated a release, unaccompanied by such words of reference, it would be very different. But, here, there are no words of reference; and we must, therefore, look to the substance of the deed, and there we find no statement of payment, but only of an agreement to pay. It is to me, therefore, that this does not amount to an estoppel, so as to shut out the plaintiff from proof of the transaction. Estoppels are odious in law, and, being so, they ought not to be allowed, unless they are very plainly and clearly made out. That is the case in this deed; and, therefore, I think, it is an estoppel; and then the verdict is right.

J. If a party give a general release, it will, necessarily, extend to all debts then due; and the passage from *Co. Litt.* is to that effect. But that is to be understood of a release without any previous qualifying its operation. If there be introduction of matter, that will qualify the general words of the release. That is the case here. It is quite clear, looking to the recital, what was the intention of these parties.

1822.

 Entered
 against
 Court.

1822.

LAMPON
against
CORKE.

The words, "as hereinbefore is mentioned," the parties referred to the previous agreement to pay is stated. In *Rowntree* the debt was, in general terms, admitted to be due. But that is not so here, there being no receipt annexed. As to the receipt indorsed, it is on a different ground; for, not being under any legal estoppel, and its truth may be disputed, it must, therefore, be refused.

Friday,
April 26th.

Where the facts tending to criminate a magistrate took place twelve months before the application to the Court, they refused to grant a criminal information, although the prosecutor, in order to excuse the delay, stated that the facts had not come to his knowledge till very shortly previous to the application.

The KING against BISHOP,

SCARLETT had obtained a rule nisi for a criminal information *mas* term, for a criminal information against the defendant for corrupt practices as a justice of the peace. The latest circumstances alleged in the prosecution, took place in 1820. By way of account for the delay, the prosecutor swore that he had no knowledge of the facts till shortly before the application, when there having been a meeting on the 17th November last, for the purpose of purgating the defendant's conduct, he applied to the magistrate not being satisfied with the explanation, instituted the present enquiry.

Campbell and *Oldnall Russell*, shewed that the application was rejected, first, that the application was not the same as they referred to *Rex v. Marshall* (a), and *Marshall v. Russell* (b), where it was so held. If the law will afford an excuse, a wide door will be in all cases easy to find some one who will prosecute.

and *Taunton*, contra, relied on the investigation of the 17th November last, as taking the case out of the usual rule.

Mr C. J. We do not by discharging this rule, open the door to an enquiry, for a bill of indictment may be preferred against the defendant. But if we admit this excuse, we should entirely frustrate the useful rule to which we have been referred. If at the investigation all the magistrates had concurred in directing such an application to be made, the case might be different; but that does not appear to be the case. The rule must be discharged.

The Court upon this objection, having refused to discharge the rule with costs, *Campbell* waived the objection and went into the merits.

Rule discharged with costs.

BRITT and Another against WATSON.

BRITT for the non-performance by the defendant of a special agreement, relating to the sale of sacks of flour. Plea general issue. At the trial before Mr Justice Assizes for the county of *York* before *Bayley* appeared that the plaintiffs, who were millers at *Hull*, on the 22d October, 1821, made an agreement with the defendant, a corn merchant, for the sale of sacks of flour, at 50s. per sack, to be got ready for the plaintiffs, to ship to the defendant's order free on board at *Hull*, within three weeks, to be paid for by a bill of exchange on *London* at two months date, on receipt of invoice. There was no memorandum in writing of the contract,

S s 3

1822.

The King
against
BRITT.

Friday,
April 26th.

Where there was a verbal contract by the plaintiffs, who were millers, for the sale of a quantity of flour, which, at the time, was not prepared, and in a state capable of immediate delivery: Held, that this was a contract for the sale of goods within 29 Car. 2. c. 3. s. 17.

nor

1822.

GABRIEL
WATSON.

nor any earnest paid. The flour at the bargain was not prepared, so as to be immediately delivered to the defendant. Judge at the trial was of opinion, that within the 17th section of the statute of plaintiffs were accordingly nonsuited. A

Scarlett by leave, moved to enter a plaintiff. This case falls within the authority of *Osborne* (a), *Clayton v. Andrews* (b), *Buck*. (c) In all these cases the Court held the goods were not capable of immediate sale did not fall within the statute of frauds. *Wyatt* (d) is distinguishable, for there the goods were fully prepared, but here it only existed as unground wheat, at the time of the sale.

ABBOTT C. J. In *Towers v. Osborne* which was ordered to be made, would that order have had any existence. The plaintiffs were proceeding to grind the wheat for purposes of general sale, and sold this to the defendant as part of their general stock. This is indeed somewhat nice, but the case of *Osborne* is an extreme case, and ought not to be followed further. I think this case was rightly decided, the contract being one for the sale of goods within the 17th section of the statute of frauds.

BAYLEY J. The nearest case to this is *Andrews*. But that decision was, as it

(a) 1 Str. 608.

(b) 4 Burr.

(c) 5 M. & S. 179.

(d) 2 H. L.

ed by *Rondeau v. Wyatt*. This was substantially
act for the sale of flour, and it seems to me
rial, whether the flour was at the time ground or
The question is, whether this was a contract for
or for work and labour and materials found.
it was the former, and if so, it falls within the
of frauds.

ROYD J. I am of the same opinion. I cannot
with the judgment of the Court in *Clayton v.*
t. This was a contract for the sale of goods,
before the verdict is right.

J. concurred.

Rule refused.

CARTWRIGHT, Esq. *against* WRIGHT.

Saturday,
April 27th.

ON the case for a libel. Plea general issue.
the trial at the *Westminster* sittings after last
term before *Abbott C. J.*, the libel given in
was contained in a book published respecting
Pett by the defendant, called "The Book of
y" and was as follows: Many well-intentioned
have expressed their surprise, that the "En-
" should have been willing to accept of a seat
tion's den, purchased with the bank notes of a
ose "incapability and baseness" he had so
y exposed. To convince such persons, that this
conduct was strictly patriotic, we have only to as-
a, that in so doing, he was walking in the foot-
hat "Venerable Veteran," whose "Creed is the
of excellence," (see No. 195.) and who, in an

Where a libel-
lous paragraph,
as proved, con-
tained two re-
ferences, by
which it ap-
peared to be in
fact the lan-
guage of a
third person
speaking of the
plaintiff's con-
duct, and the
declaration in
setting it out
had omitted
those refer-
ences: Held,
that these omis-
sions altered the
sense of the
remainder, and
that the vari-
ance was fatal.

1822.

CARTWRIGHT
against
WRIGHT.

article of that creed, has laid it down as
"we must, in fighting the enemy, not
even despicable and detestable men,"
p. 82. The libel as set forth in the declaration
the words "(see No. 195,)" and the words
v. 32, p. 82." The Lord Chief Justice
that this was a fatal variance, and that the
was nonsuited. And now,

Denman moved for a new trial, that the
not alter the sense, for the defendant's answer
matter respecting the plaintiff; and that the
not alter that: they only shew that the
speaking of the plaintiff, has adopted
another person. If so, *Tabart v. Tippet*
authority to shew, that the omission of
not alter the sense of the remainder is
also referred to *Bell v. Byrne*. (b)

ABBOTT C. J. I thought at the trial
of the same opinion, that this was a fatal
much as the meaning of the paragraph given
materially differs from that set out in the
Reading the declaration, I should understand
as meaning, that the defendant had his
assertions there stated respecting the
when the libel itself is produced, and the
reference there contained, that it is a
tended to expose the conduct, not of the
of Mr. *Cobbett*, it then turns out, that
assertions are made respecting the plaintiff
defendant, but by Mr. *Cobbett*. The mea-

(a) 1 Comp. N. P. C. 353.

(b) 13

paragraphs is different, and the nonsuit is
 J. The case of *Tebart v. Zipp* establishes,
 the omission in setting out part of a libel is not
 the sense of that which is set out is thereby
 Here there are two omissions, and the sense is
 altered. For that which appears by the declar-
 the defendant's observation, turns out when
 sions are supplied to be the assertion of Mr.
 respecting the plaintiff's and that according to
 Byrne is a fatal variance.
 J. concurred.

Rule refused. (a)

(a) Best J. was absent at Chambers.

AN and Another *against* The EAST INDIA
 Company.

Saturday,
 April 27th.

ER for forty-two chests of indigo. Plea, a
 ral issue. At the trial, before Abbott C. J., at
 ngs after last Hilary term, the following ap-
 to be the facts of the case: The goods in ques-
 igh were the property of the plaintiff, were
 at Calcutta, on board the *Cerberus*, for England:

The captain of
 a ship has no
 authority to sell
 the cargo, ex-
 cept in cases of
 absolute neces-
 sity; and there-
 fore, where in
 the course of a
 voyage from
 India the ship
 was wrecked off

Good Hope; and some indigo, which was part of the cargo, was saved, and
 as there sold by public auction, by the authority of the captain, acting bona
 fide to the best of his judgment for the benefit of all persons concerned; but the
 that there was no absolute necessity for the sale: Held, that the purchaser at
 required no title, and the indigo having been sent to this country, the original
 re held entitled to recover its value.

the

1822.

FARRER
 against
 The East In-
 dia Company.

the vessel was wrecked off the *Cape of Good Hope*, the greater part of the cargo was lost; but the indigo, however, were saved; and it appeared that any of them was materially damaged. Two chests, which were the subject of the action, were perfectly sound when they arrived in England. The indigo was sold by public auction at the *Good Hope*, being advertised as part of the cargo of the *Cerberus*, by order of the captain, who acted in accordance with the best of his judgment for the view to the benefit of all parties concerned. The defendants afterwards shipped the same to England, where they were deposited in the warehouses of the East India Company. The action was brought to recover the property, the purchasers having insisted on the present defendants. The Lord Chief Justice gave his opinion, that the captain of a ship was not authorized in selling any part of his cargo, except in case of necessity; and he left it to the jury to determine, under the circumstances, there was such a necessity. The verdict having been found for the plaintiffs.

The Solicitor-General now moved for a writ of *certiorari*, contending, first, that the captain, under the circumstances, had authority to sell the cargo; and secondly, that the sale having been in market over and above, was thereby transferred to the vendee. He submitted that, though the captain is not the owner of the cargo, and that he is to be considered to them, a mere depositary and commode, under special circumstances, the character of a supercargo is forced upon him by the general intent of the law. The law is so laid down by *Lord Mansfield* in *The Ship "The"*.

of the *Gratitudine*. (a) That learned Judge there-
 at, "in some cases, the captain must exercise the
 of an authorized agent over the cargo, as
 the prosecution of the voyage at sea, and in in-
 te ports into which he may be compelled to
 and then he mentions, as instances in the pro-
 of the voyage, the case of throwing parts of the
 verboard at sea, and of ransom by the general
 e law; and afterwards he puts an instance, in
 e master, while in an intermediate port, has the
 thority forced upon him. The case put is that
 e driven into port with a perishable cargo, where
 ter can hold no correspondence with the pro-
 and the vessel is unable to proceed, or requires
 to enable her to proceed in time. The learned
 says, "In such emergencies the authority of
 necessarily devolved upon him, unless it could
 posed to be the policy of the law that the cargo
 be left to perish without care. What must be
 He must, in such case, exercise his judgment,
 it would be better to tranship the cargo, if he
 means, or to sell it. It is admitted in argu-
 that he is not absolutely bound to tranship; he
 t have the means of transshipment; but even if
 he may act for the best in deciding to sell; if he
 wisely in that decision, still the *foreign purchaser*
safe under his acts: if he had not the means of
 oping, he is under an obligation to sell, unless it
 said that he is under an obligation to let it
 Now, in this case, the ship was totally lost.
 ared at the trial, that, at the time when the sale
 ace, there was no other vessel at the *Cape of*

1822.

FREEMAN
 against
 The East In-
 dia Company.

(a) 3 Rob. Adm. Rep. 258.

1822.

—
 FREEMAN
 against
 The EAST IN-
 DIA Company.

in *Johnson v. Shippen* (a), is this, that no authority to sell any part of the ship sale transferred no property, but that thecate; and this is cited and relied *Ellenborough*, in *Reid v. Darby*. (b) The necessity constitutes the only exception rule. Here there was no such necessity the sale, therefore, transferred no property. As to this being a sale in market, it makes no difference; for as the purchase circumstances under which the sale took place, he is considered to have bought at his peril, liable, in case it ultimately turned out that the sale existed, to have the sale vacated. Here, the property was bought, not for consumption at the place, but to be sent forward to the place of destination. As to the hardship on the master, it does not exist, for he is clearly entitled to recover from the master the price paid by him for the cargo. The rule must, therefore, be refused.

HOLROYD J. I am of the same opinion that there was no necessity for the sale, and that that must have been known to the master. In order to justify the master in acting as an agent, in transferring the property, there must be an absolute necessity for the sale; and in the purchase, he does so at his peril. The measure of the goods was never held sufficient, unless a specific authority to sell, express or implied; and the doctrine of caveat emptor applies to such cases. The circumstances under which the master has

(a) 2 Ed. Raym. 284.

(b) 10.

ch an authority, are where there is an absolute
y for it, as in the case of a wreck, without power
shipment, or where it becomes necessary to sell
the cargo, for the purpose of enabling him to
the voyage.

1822.

FRANKMAN
against
The East In-
dia Company.

J. A carrier by sea and a carrier by land stand
y in the same relation to the owner of the goods
to be carried. Their duty is, to convey the
to the place of their destination, and their au-
with respect to the goods, is such only as is ne-
for the performance of this duty. In a sea-
difficulties often occur, from which journies by
e exempt. The authority of the master of a
ust increase, in proportion to the difficulties that
o encounter. If a storm or an accident disables
from proceeding on her voyage, and the master
nself in a country where money can only be pro-
o pay for her repairs, by sale of part of the
he necessity of his crew, as Lord *Stowell* has
d it in the *Gratitude*, forces upon him an au-
to sell. So, if the ship be incapable of repair in
a port, and the cargo be perishable, or no place
got to secure it in, although the voyage be at an
would be better for the owner of the cargo that
d be sold than left to perish, and the master
in such case sell the whole. The purchaser,
g that necessity alone can justify the sale, and
n a title to what he purchases, will assure him-
t there is a real necessity for the sale before he
he purchase; and caution on his part will pre-
that has too frequently happened) the fraudulent
ships and cargoes in foreign ports. One of the
principal

1832.

s. against **INGILBY, Bart. and HAUXWELL.**

Saturday,
April 27th.

SPASS for breaking and entering plaintiff's
house, and taking his fixtures, goods, and chattels.
Execution under a writ of *fi. fa.* directed to the de-
fendant, *Ingilby*, as sheriff of the county, under which
defendant, *Hauxwell*, his bailiff, peaceably entered
premises, and seized, &c. *Replikation de injuria*,
at the trial at the last assizes for *Yorkshire*, be-
fore Serjt., the only question was, whether the
defendants were justified in seizing, under the execution,
fixtures, consisting of set pots, ovens, and ranges.
It appeared that the house where these were fixed
stood on the plaintiff's own freehold, and the
serjeant was of opinion, that under these cir-
cumstances they were not seizable by the sheriff under
execution. The plaintiff accordingly had a verdict.

A sheriff has
no right under
a *fi. fa.* to seize
fixtures where
the house in
which they are
situated is the
freehold of the
person against
whom the ex-
ecution issues.

Edale moved to enter a verdict for the defendants.
In *his* case (a), it was held that the sheriff might
execute vats, coppers, &c. which had been
used by a soap-boiler in order to carry on his trade;
whatever the tenant, as between himself and the
landlord may remove, the sheriff may seize. He re-
ferred also to *Elwes v. Maw* (b), and *Ex parte Quiny*. (c)

Curiam. The verdict is right, for these were
things which would go to the heir, and not to the

1 *Salk.* 368.

(b) 3 *East*, 38.

(c) 1 *Atk.* 477.

1832.

Winn
against
Ingilby.

creditor, and they were not liable to be
and chattels under an execution. H
where they were fixed was the freehold
which distinguishes this case from those

Monday,
April 29th.

Done on the Demise of Sir E. Nepean
Budden.

Where a copyholder has been admitted to a tenement and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture from shewing that the legal estate was not in the lord at the time of admittance.

EJECTMENT for premises in the county of Kent. At the trial, at the last assizes before the Lord Chief Justice, in the county of Kent, it appeared, that the defendant was the widow of *George Gibbs Budden*, and he was admitted to the premises in question by the custom of freebench, in the manors of *Loders* and *Bothenhampton*. It was proved, that there had been a forfeiture. On the 16th of January 1800 (at which time *Robert Gummer*, Esquire, was lord of the manor) upon the surrender of *Thomas Budden* was admitted to the reversion in question, as trustee, to hold the same to *George Gibbs Budden* for life, after the death of *Henry Budden* the estates of *Henry* and *Robert Budden* were merged in *George Gibbs Budden* was admitted a trustee in reversion. *Henry Budden* survived *George* in 1807, and in 1808, *George Gibbs Budden* was admitted to the premises by Sir E. Nepean, lord of the manor. *Adam*, at the trial, proposed to read the deed, dated 1800, under which Sir E. Nepean gave the title, that the legal estate in the manor was vested in him, but in a trustee, and, consequently,

nt could not be maintained. The learned Judge
opinion that the defendant's husband having
mitted under Sir E. Nepean, she could not be
to dispute the lord's title. The basis of the
therefore, had a verdict. And now,

1822.

Dox dem.
NEPEAN
against
BUDDEN.

moved for a new trial, and contended, that the
the defendant really depended on the surrender
mission in 1794, and that the admission in 1808
y in the nature of an attornment, in which case,
ng to *Rogers v. Packer* (a), the tenant may still
the landlord's title. The act of admittance by
is merely ministerial, and no interest passes
to the tenant. How then can the admittance
to estop the tenant from disputing the lord's

Curiam. The evidence was properly rejected.
the party under whom the defendant claims title
mitted, in 1808, he did fealty, and acknowledged
tenant to Sir E. Nepean, and she cannot now be
ed to dispute his title to the manor. It is not
ed that the legal estate has been altered since
In the case referred to, the tenant, notwithstand-
rnmment, is allowed to set up the *ius tertii*, where
ars that he is co-operating with that third per-
But here the defendant claims to set up the title
erson whose name the plaintiff would have been
to use in the ejectment.

Rule refused.

(a) 6 Taunt. 202.

1822.

*Monday,
April 29th.*

Where a power of attorney was given to fifteen persons, jointly or severally therein named, to execute such policies as they or any of them should jointly or severally think proper: Held, that an execution of such power by four of the persons named was sufficient.

GUTHRIE against ARMSTRONG

ASSUMPSIT against the defendant on a policy of insurance. Plea general. The trial at the last assizes for *Northampton* *Bayley J.*, a question arose as to the execution of the policy by the defendant. In order to prove the policy signed by the defendant was a power of attorney signed by the defendant, which he constituted 15 persons, these named and lawful attorneys, jointly and separately in his name, to sign and underwrite all policies of insurance, as they, his said attorneys or any of them should jointly and separately think proper was executed for the defendant, by four persons named in the power of attorney. The defendant thought this a sufficient execution of the power and reserved the point. The plaintiff having obtained a verdict,

J. Williams moved to enter a nonsuit on the ground that the power was naked authority and must be construed according to *Viner's Abridgement*, title *Authority*. B. p. 101. down thus: "If a letter of attorney to deliver seizin conjunctim et divisim be made on two of them make livery, the third being not good, for this is not conjunctim nor divisim." *Com. Dig. Attorney C. 11.*, is exactly to the same effect. And in *Co. Litt.* 181. b. it is stated, "If a feoffment be made, and a letter of attorney to deliver three, jointly or severally to deliver seizin

every, because it is neither by the four or three nor any of them severally." Here, the power is jointly or severally, and it is neither executed whole jointly, nor by one of them severally. The words, "or any of them," only apply to the who are to exercise the discretion, but they reference to the authority itself.

C. J. The law undoubtedly is as stated by Williams, but we are not disposed to extend the. Whenever a case exactly similar to those shall occur, the Court will feel itself bound by. But in this case we ought to look at the whole and if we do so, there is no doubt what the of it is. Here, a power is given to fifteen jointly and severally to execute such policies as any of them shall jointly or severally think. The true construction of this is, as it seems to the power is given to all or any of them to ch policies, as all or any of them should think.

The argument is, that the latter words only the persons who are to exercise the discretion. could have been quite correct, if those had been from the persons entrusted with the power. they are the same; these latter words, therefore, and the meaning of the former, and the verdict

1822.

GUTHRIE
against
ARMSTRONG,

Rule refused,

1822.

Tuesday,
April 30th.RIVERS *against* GRIFFITH

To an action on bill of exchange the defendant pleaded non assumpsit to all but a part, and as to that part a tender. Replication, that after the cause of action accrued, and before the tender, the plaintiff demanded the sum tendered: Held, that this issue would only be supported by proof of the demand of the precise sum tendered.

DECLARATION upon a bill of 10*l.* 4*s.*, drawn by the plaintiff on the 1821, payable two months after date, and the defendant. Count for goods sold and money counts. Plea, as to all but the sum of 4*l.* 7*s.* 6*d.*, parcel, &c. non-assumpsit; and as to the sum of 4*l.* 7*s.* 6*d.*, parcel, &c., and after the tender of the declaration mentioned, as to the sum of 4*l.* 7*s.* 6*d.*, parcel, &c., and after the tender of the causes of action mentioned in the declaration to the plaintiff, in respect thereof, and the defendant tendered and offered to pay the sum of 4*l.* 7*s.* 6*d.*, parcel, &c. in that behalf. The plea was alleged, to wit, on the 18th day of the month of April, 1821, the plaintiff demanded the said sum of 4*l.* 7*s.* 6*d.*, parcel, &c. from the defendant, and required the defendant to pay the same, but that the defendant refused to pay the same, by reason whereof, he, the plaintiff, sustained damage by reason of the non-payment of the said sum of 4*l.* 7*s.* 6*d.*, parcel, &c. in that behalf. The plaintiff joined, taking issue upon the demand. On the 18th day of April, 1821, before Abbott C. J., it appeared, that the defendant had tendered when due, and payment demanded, and on the following day 7*l.* was paid on account. The plaintiff was indebted to the plaintiff for goods to the sum of 1*l.* 3*s.* 6*d.* No other demand was proved. The Lord Chief Justice was of opinion, that the plaintiff ought to have proved a demand of the sum mentioned in the replication, and a verdict was given for the plaintiff.

defendant, with liberty to the plaintiff to move to
verdict with nominal damages.

1822.

RIVERS
against
GRAVITIES.

pell now moved accordingly, and contended, that
ue was proved by the fact of the plaintiff's hav-
nanded the larger sum, and that the maxim ompe
continent is so minus applied. In *Wade's case* (a) it
solved, that if a man tenders more than he ought
it is good, for the other ought to accept so much
is due to him. *Douglas v. Patrick* is an au-
to the same effect. Now, in this respect (b), there
intinction between a demand and a tender. The
4l. 7s. 6d. tendered, and alleged to have been
ly demanded, must be taken to be part of the
for which the bill was given; and the whole of
ger sum having been previously demanded, each
ry part of it was demanded, and therefore there
re a prior demand of the said sum of 4l. 7s. 6d.

Coriam. The issue is on the specific fact, whether
aintiff did or did not, before the tender of
6d., demand that very sum of the defendant.
roof is, that he demanded 10l. 4s. That proof
ot support the issue. If the smaller sum only
en demanded, the defendant might have paid it.
l, in fact, pay 7l. on the following day.

0. Undebd. inenay. l. n. d. Rule refused.

s Rep. 115. ag. 101. Riminaly (A) 5 T. R. 685.
See *Spence v. Holt*, 1 Campb. 181.

and (Chief Justice was of opinion that the
of the specy had proved a bona fide demand
and a bona fide payment had been made

on board the ship under the above circum-
stances, and that it was the duty of the defendant to
tender the receipt tendered to him, and not to
tender the bills of lading until that receipt had
been delivered over by the plaintiff to E. and S., and by
him to the plaintiff accordingly had a

And now, **TROVER** for 32 bunches of run down

At the trial at the last Guildhall

The contract speaks

goods being delivered free on board, which shows

ship must be considered as the warehouse of

and that the transitus was at an end by the

there. Here, too, a bill for the amount was

the plaintiff, and the invoice of the goods

on the 2d of August. At that time, therefore,

transitus was at all events at an end. Here, too,

are the consignors of the goods. In *Craven*

(a), the master had signed a receipt when the

were put on board. Here he did not do so, and

ought to have done so, perhaps on the 30th

the plaintiff's conduct on the 2d of August

over of it. That case is, therefore, distinguishable

from the present.

rr C. J. If the delivery on board the vessel to

had ever been completed, the transitus would

at an end. But when it was made at first,

accompanied by the demand of a receipt from

who represented the defendant. Now, it was

not for the plaintiff to have that receipt, for so

he retained possession of it, he was enabled to

refused to do. The Lord Chief Justice thought

182222

**Ruck
against
Hartwell.**

these goods
were sold, the
board and
upon their ship
about the agent
the vendors
ordered to the
the cap-
being al-
a receipt
which the
goods were
acknowledged
be shipped
on account of
the vendors,
which the mate
but re-
need to sign
on the fol-
wing day
signed bills of
to the
of the
Held:
that the tran-
was not
an end, but
on the in-
of the
the
were
to stop
the goods.

interpose

1822.

Back
against
HAYTILLS.

interpose a delay as to the delivery
B. and S. and retained a lien upon it
ant ought not to have signed bills of lading
receipt had been handed over to him
after having been delivered to them
The verdict is, therefore, right.

Wednesday,
May 1st.

An action lies
for the mali-
cious prosecu-
tion of a bad
indictment for
perjury: Held,
also, that a
count stating
that defendant
had maliciously
indicted plain-
tiff for wilful
and corrupt
perjury, is
good after ver-
dict, although
the count did
not set out any
indictment.

PIPPET *against* HEARN

ACTION on the case for a malicious
perjury. The declaration contained
the first of which set out the indictment
which had been preferred against the
which it appeared, that a certain cause
pending in the King's Bench, between
Hearn, and that such proceedings were
writ of enquiry was duly issued out of
directed to the sheriffs of *London*, to enquire
that the said sheriffs should make appearance
which they should take thereof, *before the*
said lord the king, at Westminster.
then set out the taking of the inquisition
Secondary, and alleged the perjury of
having been committed on that occasion.

The second count of the declaration
any indictment, but merely stated, that
general session of oyer and terminer of
the king, holden for the city of *London*,
hall, in the *Old Bailey*, within the parish
ously, and without any reasonable or
whatsoever, indicted and caused, and

the said plaintiff, for wilful and corrupt perjury.
Plea, general issue. At the trial, at the last
sittings, before Abbott C. J., the plaintiff ob-
tained a verdict, damages 150*l*. And now,

the defendant moved to arrest the judgment. Both counts
are defective. By the first it appears, that the alleged
perjury was committed coram non iudice; for the writ
was issued out of the King's Bench, and not
returnable in the Common Pleas. The Secondary
count is also defective, because, no jurisdiction to administer the oath.
The first count is too general. The indictment must
state the facts, and here it is only stated, that the defendant
indicted the plaintiff for wilful and corrupt
perjury. In *Com. Dig. tit. Action on the case for a con-*
spiracy, 4., it is laid down, that the declaration must
show a bad indictment, otherwise he cannot be law-
sued; and *Sherington v. Ward* (a) is also in
point, where it would be bad to say, that the defendant
indicted the plaintiff for felony; for, by
a general statement, the defendant cannot know
the charge against him is.

*There may be a distinction between the
indictment of felony and perjury; the former may em-
brace a variety of charges, but perjury is one distinct
crime. But, at all events, this count is suffi-
cient for a verdict. As to the first count, that is also
defective, for we are of opinion, that, where a man ma-
liciously prefers an indictment against another for a
crime, he is liable to an action for it, although the in-
dictment is defective; for, in either case, whether the*

(a) *Cro. Eliz.* 724.

indictment

1822.

Pirret
against
Hearn.

1822.

Broom
 against
 Broom

indictment be good or bad, the plaintiff is
 rejected to the disgrace of it, and put to the
 in defending himself against it.

Ru

(a) See *Chambers v. Robinson*, 2 Str. 691

CLAYTON and Others against I

Where a tes-
 tator, after be-
 queathing a spe-
 cific legacy, de-
 vised all and
 every other
 part of his real
 and personal
 estate, to be
 equally divided
 between his
 three grand-
 children, share
 and share alike,
 for ever; and
 also, that if
 either of them
 should happen
 to die, without
 child or child-
 ren lawfully
 begotten, that
 then such part
 or share of the
 one so dying
 should be
 equally divided
 amongst the
 surviving
 grandchildren;
 but if any of
 his grandchild-
 ren should die,
 and leave child
 or children law-
 fully begotten,
 that such child
 or children
 should have
 their parents'
 share equally
 divided amongst
 them, share and
 share alike: Held,
 that under this
 children took an
 estate in fee simple,
 as tenants in common.

THE *Vice-Chancellor* sent the following
 opinion of this Court: *William Clayton*
 being seised in fee simple in possession, of
 estates, and, amongst others, of one-eighth
 of the *Broom Stair* estate, made his will, duly
 attested, for passing real estates, and bearing
 date the 12th day of *July*, 1810; and thereby, after
 paying just debts, funeral and testamentary expens-
 es, and the costs of his will to be paid by his execu-
 tric, and devising his interest in *Swans*
 to his grandson, *William Clayton*, as for and
 against all his eighth part or share of both lands, but
 timber, and five cottage-houses, with all the
 tenants to him thereto belonging of a certain
 in the township of *Denton* and *Haughton*,
 the possession of *John Hooley* and others
 thereof, and commonly called the *Broom*
 and as to divers other premises in the same
 tioned, both leasehold, copyhold, and freehold,
 also all his household goods and furniture,
 hay, either in the buildings, or growing, or
 any parts of the said lands, or elsewhere,

Held, that under this d
 children took an estate in fee simple, as tenants in common.

of cattle, and all and every his implements of
 ry ware, whatsoever and wheresoever unto him
 g, together with all the money he might hap-
 ave by him, or out upon interest, and book-
 id wearing apparel, together with all the rest,
 and remainder of his real and personal estate
 ver and wheresoever unto him belonging in the
 n of *Great Britain*, or elsewhere, he gave and
 the same unto his two grandsons, *William Clay-*
ton, and his grand-daughter,
Elizabeth Clayton, their several respective heirs and as-
 ever, upon trust nevertheless, and to and for
 eral uses, intents, and purposes thereafter
 d concerning the same; and then the will
 ed with these words: "and upon trust that my
 or the survivors of them, their heirs, or
 shall, immediately after my decease, take an
 y of all my household goods and furniture,
 cattle, hay, corn, and husbandry ware, together
 the money I may have by me, or out upon
 at the time of my decease, together with my
 ts, and all other my personal estate whatso-
 d pay out of the same all my just debts, funeral
 s, the probate of this my will, and all other
 ble charges concerning the same, and all
 ust that my trustees, or the survivor of them,
 rs or assigns, shall pay unto my daughter-in-
Elizabeth Clayton, the mother of my trustees,
 nd every year during the time and term of her
 life, all the interest that may arise and become
 nd from the sum of 500*l.*, which I have now
 on interest upon the turnpike-road from *London*
Buxton to Manchester; And also upon trust,
 that

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CLAYTON
 against
 Lowe

1827.

 CLAYTON
 against
 LOWE.

that after the decease of my said daughter *therine Clayton*, I will that the said surviving interest thereof, together with all and singular rents arising of and from my said estates mentioned and expressed, with my interest in mines, book-debts, money I may have upon interest at the time of my decease, and every other part of all my real and personal whatsoever or wheresoever, as hereinbefore and expressed, shall be equally divided among my said grandsons, *William Clayton* and *David Clayton*, and my grand-daughter, *Elizabeth Clayton*, and share alike for ever, the *Swansea* before devised to my grandson, *William Clayton*, accepted. And also, that if either of my said grandsons, *William Clayton* or *David Clayton*, or my grand-daughter, *Elizabeth Clayton*, shall die without child or children lawfully begotten, I will order and direct, that such part or share of my real and personal estate whatsoever, at my dying, shall be equally divided among my surviving brothers or sister, share and share alike. And I pens, that any of my aforesaid grandchildren shall die without child or children lawfully begotten, such child or children shall have their full and share of all my estate and effects whatsoever, as divided among them, share and share alike. *William Clayton*, the testator, departed this life on the 10th of the said estates, soon after the death of my said and without revoking or altering the will of *William Clayton*, *David Shaw Clayton*, *Elizabeth Clayton*, his grandchildren, him surviving, by the virtue of the will of *William Clayton*.

Clayton, David Shaw Clayton, and Elizabeth the plaintiffs, entered into, and still are in possession of the said one undivided eighth part of messuages or tenements and close of land situate at *Whitton and Denton*, in the county of *Lancaster*, known by the name of the *Broom Stair* estate, the estates therein devised. *Catherine Clayton*, daughter-in-law of the testator, is still living. *William Clayton* was, at the death of the testator, his heir and is still living. The question for the opinion of the court was, what estate or interest *William Clayton, David Shaw Clayton, and Betty Clayton*, took by the will of the testator under the said will of the testator *William Clayton*, in one-eighth part or share of the messuage or tenement and closes of land situate at *Whitton and Denton*, in the county of *Lancaster*, and known by the name of the *Broom Staire* state. This was argued in last term by

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CLAYTON
against
LOWE.

for the plaintiffs. In this case the plaintiffs were entitled to a simple in the 8th share of the *Broom Stair* estate. This was a devise of both real and personal property, whatsoever and wheresoever, to be equally divided between his grandchildren, share and share alike. These words are sufficient to carry a devise, admit of no doubt. But then follow the gifts over, that in case any of his grandchildren die and leave children, then the share of such grandchild shall be equally divided amongst the surviving brothers and share and share alike, and in case they died, leaving children, then the share to be divided amongst the children, share and share alike. He seems, therefore, to have contemplated the estate, going over to the children in

1822.

Clayton
v. Lloyd
Lewy

in every possible contingency. If, however, he really had his intention, he would have given his grandchildren estates for life, with remainder to all their issue. In cases of such issue, Courts have usually considered the gift executory, and as depending on the death of some of the devisees in the testator. That consideration makes it clear: *Wright v. Stephens* (a) and *Doe v. [illegible]* authorities in point. And here, the gift both of real and personal property makes this case stronger than the case of *Doe v.*

C. P. Cooper, contra. Here, the gift was a fee simple, determinable in the event without issue living at their death, and limitations over may be good by way of devise. It may be admitted, that the will devise to the grandchildren are sufficient to carry a fee, but they are qualified by those in *Doe v. Jeffery* (c), the devise was to be theirs for ever, and in case he should die without issue, then to E. M. and S., or survivors of them, share and share alike. It was held by the Court, that the devise over was a good executory devise. This case relied on the circumstance, that the devise was to persons in esse, *Pells v. Brown* (d), *Doe v. [illegible]* (e), *Doe v. [illegible]* (f), *Doe v. [illegible]* (g).

(a) 4 B. & A. 574.

(c) 7 T. R. 589.

(e) 3 T. R. 143.

(g) 3 B. & A. 346.

(b) 25 B. & A. 101.

(d) 1 Cr. J. 101.

(f) 2 B. & A. 101.

are also authorities in point. There the courts in furtherance of the intention of the testators, devises over were good by way of executory Here too, the first devise is not to take place at the death of *Catherine Clayton*. The testator therefore mean, that the devise over should be in effect if his children should die, leaving no issue at the death of *Catherine Clayton*. In that event the limitations over would be good by way of executory devise. But, whether this be so or not, in this case the plaintiffs cannot make a good title to

in reply. The cases cited are not applicable to the present. In all of them, the question was, whether the devise over was so tied down to a particular period, as to make the limitation good as an executory devise, or whether the devise was general, and so cut down the prior estate in fee simple or estate tail. But here it is very different, it is a devise of an executory devise, the fee is left in the first devisee except in one particular event, and it is to go over in all possible contingencies. Therefore, the first devise be of an estate for life, it may be made of the will. If then it be once admitted by the first devise, if alone, a fee would pass, and it is the end of the case. As to the devise to *Catherine Clayton*, it is only of an annuity arising out of a particular sum of money secured on a particular road. It is possible that the beneficial interest as to the property, could be intended to be postponed till

(a) 1 B. & A. 715.

1822.

CLAYTON
against
LOWE.

her death. It is clear, that that was testator's decease. If so, there is no argument on the part of the defendant

The following certificate was afterw

We have heard this case argued are of opinion, that *William Clayton*, *ton*, and *Betty Clayton*, took under the testator *William Clayton*, an estate in fee in common in one-eighth part or share or tenement and closes of land situated *Denton*, in the county of *Lancaster*, name of the *Broom Stair* estate.

Wednesday,
May 1st.

FAIRMAN against I

A petition addressed by a creditor of an officer in the army to the secretary at war, *bonâ fide*, and with a view of obtaining, through his interference, the payment of a debt due; and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, and which, if true, would constitute a malicious libel for which an action is maintainable. In such a case, evidence may be received to shew that the writer stated in the petition to be true.

THE declaration stated, that the plaintiff was an officer in the army, and was entitled to half-pay; yet, that the defendant, to be believed that the plaintiff was entitled to just debts, and to cause his half-pay to be paid, and unjustly to compel the payment of 175*l.*, alleged to be due from the defendant, published the libel in ques

tion, addressed to Lord *Palmerston*, the secre-
 tary, inclosing two bills of exchange, drawn by
 ight upon the plaintiff, by the description of
 man, No. 6. *Surrey-street, Strand*, payable three
 after date to the drawer's order, and by plaintiff
 payable at *Austen, Maund, and Co.'s*, and in-
 certain writing annexed to the copy of the bill;
 r at *Austen, Maund, and Co.'s*: left no orders
 e bill. Answer at No. 6. *Surrey-street*, that *W. B.*
 did not reside there, and that there were no
 pay the bills." The declaration then set out
 which was as follows: "Your petitioner
 your lordship's well-known justice and dis-
 to benevolence to be extended towards him,
 ting an officer in his majesty's service, Cap-
B. Fairman, to discharge a debt which has
 e to your petitioner above four years, and
 frequently applied for, has never been noticed
 in *Fairman*, but unjustly and unfairly he has
 your petitioner of any redress, except through
 dship's humane consideration, by giving an
 as will appear by the inclosed, where he had
 , nor even was known, Your petitioner begs
 bly to inclose copies of two bills of exchange,
 100*l.* and the other for 75*l.* 10*s.*, which your
 r received in payment as money, and, when
 tain *Fairman* had given no order to pay them,
 his agent's or at the address of his bills, where
 tioner was informed he did not reside, nor did
 w any thing about his bills. Since that period
 tioner has repeatedly written to Captain *Fair-*
 o, although he has received the letters, has
 ticed them, and has concealed himself from a

1802.

~~=====~~
Fairman
 against
 1794.

1822.

 FAIRMAN
 against
 IVES.

just and lawful demand : your petition
 wish in addressing your lordship, but
 ence may be extended towards him, by
Fairman to discharge his debt. Plea,
 the trial before *Abbott C. J.*, at the last
 the defendant proved that the two bills
 tioned in the libel were accepted by
 that, when presented for payment at *A*
 Co.'s the answer was, that there were
 the answer to the enquiries at No. 6. that
 that the plaintiff did not reside there,
 sons who lived there know any thing
 Lord Chief Justice told the jury, that
 that the petition contained only a fair
 ment of facts, according to the understanding
 party who sent it, they ought to find
 defendant. The jury having so found

F. Pollock now moved for a new trial
 that as the defendant had not pleaded
 the evidence of the truth of the facts
 libel ought not to have been received.
 issue, the only question was, whether
 forth was injurious to the plaintiff
 whether the defendant published it.

ABBOTT C. J. I am of opinion that
 was properly received, to shew the circumstances
 which the supposed libel was published
 that it was a good answer to the action
 of not guilty, for the defendant to shew
 in question was addressed to the jury

for the purpose of obtaining redress, and
the purpose of slandering the plaintiff.

1822.

FAIRMAN
against
IVES.

BYD J. (a) I think the direction given by my
Chief Justice to the jury was perfectly right. In
the case of *Cleaver v. Sarraude* (b), which was tried at
the trial was expressly held, that no action was main-
tainable for matter contained in a written communica-
tion made bona fide to a friend, and not for the purpose
of slandering. The two cases are not exactly similar.
The case cited rather resembles that of a bad character,
where a master of his servant. There, unless it be
manifestly done, the communication is considered pri-
vate by the occasion on which it is made. So, in the
case of a confidential communication made between
two persons to prevent an injury, and not for the purpose
of slandering, the occasion justifies the act. If the com-
munication be made maliciously, the case would be
different; and the falsehood of the facts stated might,
in such cases, be evidence of malice. In the case of
a statement spoken by a barrister (c), in a course of a
trial may not be, perhaps, sufficient to allege and
show that the words are false and malicious, with-
out alleging and shewing that they were uttered
without reasonable or probable cause. The truth, in-
stead of the facts, which form the subject-matter of the
statement, generally speaking, can only be given in evidence
specially pleaded; but in that case the speaking or
publishing of the slander is not justified by the mere occa-
sion on which it is spoken or published, but because it is

(a) Bayley J. had left the court.

(b) *Cleaver v. Sarraude*, cited in 1 *Campb.* 268.

(c) See note (b) in *Hodgson v. Scarlett*, 1 *B. & A.* 245.

such expressions as an angry man was likely to
such as would have rendered the letter a libel
been sent into general circulation, or to any
, without a sufficient cause to justify the send-

But the circumstances under which this let-
ter rendered it a privileged communication. It
application for the redress of a grievance, made
of the king's ministers, who, as the defendant
thought, had authority to afford him redress.
may be done without hazard of an action or
on, if the application be made bonâ fide with
obtain redress for some injury received, or to
punish some public abuse. In the case of
v. Bayley (a), a letter addressed to General
and the four principal officers of the Guards, to
be presented to the king, stating that the pro-
secutor had obtained from the defendant a warrant for
payment of money due to him from government,
and a promise of paying the defendant such money,
that the prosecutor had received the money, and
had paid it over to the defendant; was held to be no
representation of an injury, drawn up in a
way for redress. That case is like the present.
The officers nor the king could give the defend-
ant assistance in receiving the money wrongfully

But the king had authority to dismiss an
officer from his service, and most probably would dis-
miss one who hesitated to do what honour and jus-
tice required. In the present case, there was, at least,
a sufficient cause for thinking that the secretary at war
might advise his majesty, that the plaintiff was not

1822.

 FAIRMAN
against
IVES.

(a) 5 *Bacon's Abr.* tit. *Libel*, A. 2.

1822.

FAIRMAN
against
JURY.

worthy to remain in the army, unless
defendant immediate justice.

In the case of Colonel *Bayley*, Lord
states an opinion, that an address to the
Greenwich Hospital, delivered to the
the purpose of calling their attention to
to exist in the hospital, was not a libel.
same principle, the pleadings and evidence
proceeding, whether civil or criminal,
even though the Court in which they are
no jurisdiction over the cause. And
king upon matters in which the crown
interfere; and petitions to parliament
petitioners, beside presenting them to
them, and distribute them amongst the
within the same rule. All these are pro-
that men may not be prevented, by the
secution or action, from making commu-
may be either important to themselves,
the public. This privilege, however, must
for, if such a communication be made
without probable cause, the pretence
made, instead of furnishing a defence,
the case of the defendant. There is a
difference between sending a letter for
as that in this case and publishing it
sending it to any private individual. In
the object of obtaining redress repels
of malice, on which actions for slander
the other cases it is quite different, for
the only object.

(a) 21 *Howell, State Trials*, 70.

1822.

HAMILTON against STOW.Friday,
May 3d.

SPASS for seizing and taking plaintiff's tele-
 scope. Plea, first, not guilty; secondly, justifying
 seizure, as the collector of the rates and duties pay-
 at the harbour of *Dover*, in respect of a duty of
 pence per ton, payable by the plaintiff as the
 of a ship called *The Lord Duncan*. Replication,
 e said ship, at the time she came into the har-
 of *Dover*, as in the plea mentioned, and from
 until at the said time, when, &c. was employed
 service of his majesty. Rejoinder, that the said
 as not employed in the service of his majesty, as
 in the replication; upon this issue was joined.
 case was tried at the *Kent* summer assizes, 1820,
 e jury found a special verdict; which stated the
 ng facts: The vessel upon which the rate of
 ton was demanded, was a packet called *The Lord*
 , and was, at the time of the committing of
 spasses, employed in the service of his majesty
 rying the public mails of letters and dispatches
 majesty's government from *Dover* to *Calais*
 tend, and in bringing back letters and dis-
 of his majesty's government from *Calais* and
 to *Dover*. At the time of the committing of
 spass, the plaintiff was the commander of the
 and was so appointed in the year 1807 by
 st-masters general; it appeared by the appoint-
 that he was appointed to be the commander of
ord Duncan packet boat, employed by the post
 office,

An act of par-
 liament, impos-
 ing a tonnage
 duty on vessels
 coming into the
 harbour of
Dover, contain-
 ed an exception
 of all vessels
 employed in
 his majesty's
 service: Held,
 that a vessel
 hired by the
 post-masters-
 general to carry
 the mails and
 government
 dispatches to
 and from *Dover*
 to *Calais*, &c.,
 the master of
 which was
 permitted to
 carry passen-
 gers and their
 luggage, and
 bullion, upon
 freight, is a
 vessel coming
 within the ex-
 ception.

1822.

HAMILTON
against
Stow.

office, in his majesty's service, to carry mail from *Dover, Harwich, &c.* and he was there to obey such orders as he should from time to time receive from the post-masters or their agent for that purpose. The plaintiff, as commander of the vessel employed by the post-masters general to convey mail to and from *Dover* to *Calais* and *Ostend*, carried passengers, together with their baggage, carriages, and also bullion and foreign gold and silver, several packets employed in his majesty's service from *Dover* to *Calais* with public mails and dispatches; in rotation, four times a-week, each week to *Ostend*, and return in rotation to *Dover*. *The Lord Duncan*, and each of the other vessels of private property of its respective commander, the plaintiff, on the 6th of *June*, 1819, came from the harbour of *Dover* with *The Lord Duncan* from which vessel brought no mail of letters, but had patches for the secretary at war, and several carriages and a carriage belonging to one of them, and bullion to the amount of 21,250*l.* sterling on board the vessel, and the plaintiff received from the post-masters the sum of 12*l.* 10*s.* for their passage-money, and the owner of the carriage two guineas for hire, and 10*l.* 12*s.* for the freight of the bullion. The plaintiff, by the public regulations, was permitted to retain, and did retain, two-third parts of those sums, and he paid the other third part to the post-masters for the packets at *Dover*. The special verdict then returned was, that the ship had no other goods or merchandize on board, and that none of the said packets were liable to be carried by the commissioners of customs to carry goods, wares, or merchandize.

Land, for the plaintiff, contended that this vessel, at the time of the trespass, was in his majesty's service, in the meaning of the 47 G. 3. c. 69. s. 5., by which it is provided, that the act should not be extended to charge any vessels belonging to his majesty, or that he may be employed in his service, with any of the duties to be imposed by the act.

Withy, contra. This vessel was the private property of the master, and he would have been liable to contribute to the poor-rate in respect of his beneficial enjoyment of it. *Rex v. Jones*. (a) In that case, the argument was nearly in the same terms. The exemption contained in the 47 G. 3. c. 69. is one to which the master would be entitled. Here, too, the employment of the crown was partial; for the master might carry on a vessel of a particular description; and, therefore, as to the purposes, except that of carrying the letters and dispatches, the vessel was not in the employ of the government.

Worke C. J. The statute contains two exemptions; first, all vessels belonging to his majesty; and, secondly, vessels employed in his service. The case of *Rex v. Jones* is a good authority to shew, that the vessel, in this case, belonged to the captain, and not to the king; but it does not apply to the latter branch of exemption. It is not possible to say that this vessel was not employed in his majesty's service, when it came into *Dover*. The captain is appointed by the post-master general. The appointment of the captain states the vessel to be em-

(a) 8 *East*, 451.

ployed

1828.

HAMILTON
against
STOW.

1822.

HAMILTON
against
STOW.

employed in his majesty's service; and he obey such orders as he shall from time to time receive from the agents of government. This law is quite inconsistent with the right of emigration in the captain. Whatever is taken on board besides the mails and dispatches, is by the permission of government. I am clearly of opinion that this vessel was, at the time of committing the offence, in the service of his majesty.

Judgment for the plaintiff.

Friday,
May 3d.

ORTON against BUTLER

A count stating that defendant had and received to the use of the plaintiff a certain sum of money, to be paid by the defendant to the plaintiff upon request; and the non-payment upon request, and that the defendant converted and disposed thereof to his own use, is bad upon demurrer.

THE declaration in this case contained two counts. The two former of which were framed upon a deceit by the defendant, in fraudulent conversion of money by him (having been employed in purchasing a certain fish, and having purchased it for one shilling and sixpence,) had purchased it for one shilling and sixpence, whereby he obtained the said sum from the plaintiff. The third count was as follows. And, whereas also the said defendant, to wit, on, &c. at, &c. had and received to the use of the plaintiff, a certain sum of money, to wit, the sum of ten shillings to be paid by the defendant to the plaintiff upon request. Yet the defendant, notwithstanding his duty in that behalf, but contrary to the request, not, although often requested, paid to the plaintiff the last-mentioned sum of money, or any part thereof, hath wholly omitted so to do; and on the said day, thereof, afterwards, to wit, on, &c. at, &c.

ed thereof to his own use. The defendant pleaded two first counts the general issue, and demurred only to the last count.

1822.

 ORTON
against
BUTLER.

Alderson, in support of the demurrer. A similar case to the present came before the Court in *Samuel v. Miles in Error*. (a) There the ground of the demurrer was the misjoinder of a count like the present, other counts framed in tort, and though the courts Common Pleas and King's Bench both held that the demurrer was not sufficient, yet the judges seemed to incline strongly, that the count, if particularly demurred to, would be bad. This is in fact, a count for money paid and received, framed in tort. And if this be good, there will no longer be any distinction between a count in assumpsit and a count in debt. The consequences of this will be destructive of great inconvenience. A party may be deprived of his plea in abatement, and his set off may be defeated by so framing the count. For the rules of set off speak only of mutual debts. So that if a cause of action be within the jurisdiction of the superior court, as for instance, the *London* Court of Chancery, and the plaintiff recovers under 5*l.* damages, he may, by framing his count in the present mode, avoid the act, which would otherwise deprive him of his set off. For the statute 3 *Jac.* 1. c. 15. s. 4. is expressly confined to actions of debt, or upon the case in assumpsit.

Andal, contra. This is substantially a count in assumpsit. There is a delivery of money to the defendant,

(a) 6 *E.* 385. 1 *New R.* 42. S. C.

and

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Garro
against
Burton.

and a misfeasance on his part by converting to his own use. Instead of stating a bailment to the defendant, it states a bailment to him, but is not sufficient. It may be, however, said, that in trover, it is bad, not being sufficiently certain. It only states a sum of money to have been received by defendant, and not certain specific money. But this is only a cause of special assumpsit and is not assigned as a cause in the present count therefore, is in fact framed in tort. The objection is, that it is not framed with certainty. A similar count to the present was held good in the case of *Samuel v. Judin (a)*, and the Court gave no opinion against its sufficiency. The present is an action quasi ex contractu, where a count may be framed either in assumpsit or case, according as it is most convenient to the plaintiff.

E. Alderson in reply, was stopped by the

ANNOTT C. J. The law has provided specific forms of action for particular cases, of such importance that they should be preserved, and therefore to look with great jealousy to any change of this sort. The present count states, that the defendant had and received to the use of the plaintiff a certain sum of money, to wit, ten shillings, which the plaintiff claims as his own, but which the defendant converts to his own use. It is contended, that this is a count in case. Now, the action of trover is only maintainable for specific property; it will lie for so many

er, and in that case a defendant can only redeem
f by tendering to the plaintiff the same specific

But in this case he clearly might do so, by
ing an equal sum of money. There is, therefore,
erely a want of certainty in the count, but it states
which is not the subject of an action of trover at all.
emurrer, therefore, must be allowed.

1822.

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Oarow
egates
Domas.

WILEY J. I think we ought not to accede to the
tion attempted in the present case. The statute
tminster gave the action on the case, where there
viously no proper form in the register, and from
case (a) to the present time, the remedy for
had and received has been either by an action
umpsit or debt. The question is now, whether
aintiff can form a third; if we were to allow that,
provisions made in many instances by different acts
liament would be evaded, and the instance to
we have been referred of the statute 3 Jac. 1.
s. 4., shews strongly the inconvenience that
result from such a decision.

LEWIS J. I am of the same opinion. It is ad-
d, that this is not in point of form well framed in
, but it is argued that it is so in effect. But I
t agree with that argument; no part of the count
s the money had and received, to have been pre-
y the plaintiff's property, or in his possession,
consistently with it, the defendant might have
ed the money from a third person. And there is
ng stated in the count to shew, that the plaintiff

(a) 4 Rep. 92.

had

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against
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had assented to its being his money at the conversion took place. There being for any such count as this, and the regular hitherto been either debt or assumpsit, it is that the present count is not sufficient.

Baron J. This is an action upon a contract established by law, and therefore ought to be maintained. There is no broad distinction between a contract and a delict. If a party is guilty of a contract, and the party brought up to proceed in the present mode of framing a delict, which would be attended by the pointed out in argument. The defendant is deprived of his set off, and if he lived under the dictation of an inferior court, of his costs, and to that, would not be able to pay money. The action of trover is clearly not maintained in a case like the present: there a party recovers for the detention of specific goods. But it is inconsistent with justice, if where a sum is delivered generally to a defendant, the plaintiff holds, that he could not defend himself unless he prove that he had restored the same sum delivered to him. But this would be a hardship were to allow the action of trover to be maintained.

Judgment for

1822.

MURRAY against ELLISTON.

Friday,
May 3d.

Lord Chancellor sent the following case for the opinion of this Court. In 1820, Lord Byron wrote a tragedy intitled *Marino Faliero, Doge of Venice*, an original tragedy, in five acts, with notes; and by deed, dated April 14th, 1821, he assigned the said tragedy to the plaintiff, and the copy-right thereof, and the exclusive privilege of printing and publishing the same, and all the profits and advantage thereof, to the plaintiff, in consideration of the sum of 1050*l.*, which was duly paid. The plaintiff caused the tragedy to be printed; and, on the 14th of April, 1821, copies of it were, for the first time, printed and published for sale, for the sole benefit of the plaintiff. The defendant, being the manager of the theatre royal, *Drury-lane*, after the publication of the tragedy, printed and exposed to view, at the entrance to the theatre, and at divers other places, in the most conspicuous parts of *London* and *Westminster*, a notice of the performances at the theatre, dated 24th April, in which was contained the following notice: "Who have perused *Marino Faliero* will have observed the necessity of considerable curtailments; that conversations or soliloquies, however beautiful and interesting in the closet, will frequently tire in recital. This intimation is due to the ardent wishes of Lord Byron's eminent talents, and will, it is presumed, be a sufficient apology for the great freedom taken in the representation of this tragedy on the *Drury-lane* theatre." And at the foot of the

The manager of a theatre having publicly represented for profit, a tragedy, altered and abridged for the stage, without the consent of the owner of the copyright, is not liable to an action, although the tragedy had been previously printed and published for sale.

V.

X x

bill,

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against
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bill, the defendant announced and advertised altered and abridged for theatrical representation in the theatre, as follows: "To-morrow, for the first time, Lord Byron's tragedy of *Marino Faliero*, D. D. No permission or authority was at any time given to the plaintiff or Lord *Byron* to the defendant or any other person or persons, to represent or publish the tragedy printed for the plaintiff, or any person, to give out, announce, or advertise the said theatrical representation. On the 25th *April*, 1822, the plaintiff filed his bill in Chancery for an injunction against the defendant from acting the tragedy in the theatre, which was granted. On the evening of the 25th day of *April*, the defendant publicly acted the tragedy, altered and abridged, for the theatre royal *Drury-lane*; but in that tragedy certain parts of it, which the said defendant considered not fit for representation, were omitted. It was, whether an action could be maintained by the plaintiff against the defendant, for publicly representing for profit the tragedy so abridged.

Scarlett, for the plaintiff. This question is different from that in *Colman v. Wathen*. (a) The point determined upon the words of the statute, 8 *Ann.* c. 14, was, that the acting on the stage was not a publication of it within the meaning of the statute. Here, the question is different; for it is not the question of the statute, but on the right of property in the plaintiff's work. The moment the right of property is established, the consequences must follow, that if injury done to the property is the subject of an action. This is only one mode in which

(a) 5 *Term Rep.* 245.

Unfair and malicious criticism is another, and an action will lie. *Carr v. Hood*. (a) Suppose it failed of success when represented, the sale of the work would thereby be damaged. Besides, the opinion of the public would be thereby satisfied, and the plaintiff would be injured in the sale of the work. Whether that right of property arise from the common law, or from the statutes relative to it, is in this case immaterial. For, if the statute makes a literary work property, the common law will give the remedy for the violation of it. The only question is, whether the representation of this piece for profit may not injure the plaintiff. If so, the plaintiff is entitled to the judgment of the Court.

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MURRAY
vs
BELLISTON.

Thus, contra. In *Donaldson v. Beckett* (b), the opinion of the Judges were of opinion, that the action at common law was taken away by 8 Anne, c. 19., and the author was precluded from every remedy, except by the statute and on the terms and conditions imposed thereby. The claim by the plaintiff on this point is at variance with this decision. For here, he seeks for a far more comprehensive security, and one differing with that given by the statute, and restraining the public in points of which the statute takes no notice. The case of *Macklin v. Richardson* (c) was very different: the farce of *Love à-la-Mode* had never been published, and the defendant having employed a short-handler to take it from the mouths of the actors, published it, it was held that he could not do so. But when,

(a) 1 Camp. 555. (b) 4 Burr. 2402. (c) Amb. 694.

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MURRAY
against
ELLISTON.

in *Colman v. Wathen* (a), the converse tempted, the Court held, that the action. This decision was plainly founded on copyright, the property in which is as if but one book existed, which the individuals to read on payment of a certain injury then which an author sustains by his copyright, is this; that a stranger's commission, disposes of the use and possession of the book, and thereby receives the profits which the author, is justly entitled. If then the book is taken with a reasonable strictness such as may be called for in one's own book, as if it be a bonâ fide abridgement, *Wilcox and Others* (b) shews that the remedy. Now, in the present case, a threat falls within the principle above laid down thitherto, not to read the work, or to have it to see the combined effect of poetry, scenery, &c. Now of these three things, two are not the author of the work; and the combined effect is much a new production, and even more than a printed abridgment of a work. There are instances in which works published have been without the permission of their authors, been brought on the stage. The safe rule for the Court to lay down is, that an author is only protected from the piracy of his work itself, or some colourable alteration of it. In the present case the defendant is entitled to the judgment of the Court.

(a) 5 T. R. 245.

(b) 2 A.

following certificate was afterwards sent :

have heard this case argued by counsel, and opinion, that an action cannot be maintained by plaintiff against the defendant for publicly acting representing the said tragedy, abridged in manner and, at the theatre-royal *Drury Lane*, for profit.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

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against
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ROBINSON against ELSAM.

The plaintiff, an attorney, had, on the 19th *March*, 1821, delivered to the defendant his bill for business, amounting to 521*l.* 1*s.* 3*d.* On the 21st *April* the plaintiff arrested and held the defendant to bail for 50*l.* and upwards, and declared in the action. On the 1st *May*, a Judge's order was obtained for referring the costs to the Master, to be taxed, upon the defendant's undertaking to pay the amount that should appear in the taxation, and the costs of the action, the defendant being at liberty to deduct any payments made in account. The Master taxed the bill at 299*l.* 16*s.* 6*d.*; after giving the defendant credit for 15*l.*, there remained a balance due to plaintiff of 284*l.* 16*s.* 6*d.*; the costs of the action to recover the bill were then added at 13*l.* 15*s.* 7*d.* The plaintiff having demanded payment of the whole sum, without giving the defendant credit for a cross demand which he had against the defendant, the former did not pay the amount, and on the 9th *November* he was taken upon an attachment for non-payment of the money, and conveyed to *Dover*

An attorney brought his action for his bill of costs, and held the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing: Held, that this was a case within the 45 Geo. 3. c. 46. s. 3; and that if not within the statute, still the Court, in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances.

1832,

ROBINSON
against
ELSAM.

Castle. The plaintiff then issued a writ to bring him to *London*, and caused him to be committed to the King's Bench prison, and the sum awarded by the Master's allowance with the costs of the attachment and the costs of the writ. A rule nisi was obtained in last *Hilary* term on the plaintiff to shew cause why the order of the 14th of *May*, and of the Master's allowance thereon, as respected the costs of the attachment, should not be discharged, and why the sum should not be refunded to the defendant the sum of 500*l.* allowed and paid him for the costs of the attachment. The plaintiff should not pay to the defendant the costs of the attachment, to be taxed by the Master, and as to the taxation of his bill of costs, and why the sum should not be referred to the master to tax the plaintiff the costs of the attachment, and why the sum should not be refunded what had been overpaid on the attachment together with the costs of the writ of attachment. Upon this rule coming on in last term, the rule were referred to the Master, and the Master reported that the plaintiff had no reasonable or probable cause for arresting the defendant for 500*l.*, directed the plaintiff to refund to the defendant the costs of the attachment and to pay to the defendant 9*l.* 7*s.* 10*d.* for the costs of the action and the costs of the attachment. The plaintiff was overcharged for the attachment with the sum of 16*l.* 16*s.*, the costs of the attachment corpus, and 19*l.* 18*s.* 6*d.*, the costs of the action. A rule nisi had been subsequently obtained on the master to review his report, so far as the costs of the action to be paid by the defendant, instead of by the defendant the costs of the attachment and the costs of the application.

ryat now shewed cause. It must be now taken
 anted, after the report of the Master, that the
 ff had not any reasonable or probable cause for
 g the defendant to special bail for the amount of
 The plaintiff has not recovered the amount of
 n for which the defendant was arrested and held
 ial bail, and, therefore, this case falls within the
 words of the 43 Geo. 3. c. 46. s. 3. It is true,
 e amount was not recovered by verdict, but that
 necessary; for where the amount of the debt was
 ined by the award of an arbitrator, it was held
 a sum recovered within the meaning of the act. (a)
 case the only mode of ascertaining the amount
 as by taxation.

lett. The statute only applies to those cases
 the amount recovered is ascertained by verdict.
ick v. Gregory (b) and *Roueroy v. Alefson*. (c) In
 e cited from *Tidd's Practice*, a verdict was taken,
 to an award, and when the award was made, the
 was entered accordingly; so that the sum ulti-
 recovered might be considered as recovered
 dict. Here the sum is recovered by the Master's
 ar. At all events, the defendant is too late in his
 tion. He ought to have applied before the costs
 aid.

OTT C. J. We must now assume, after what
 aster has done, that the plaintiff had not any
 ble or probable cause for holding the defendant

Tidd's Pr. 1018. 6th ed. cites *Neale v. Porter*, K. B. 44 Geo. 3:
 10 East, 525.
 (c) 13 East, 90.

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 ROBINSON
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ROBINSON
against
ESDALE.

to bail for 500*l*. It is unnecessary to enquire whether this case be within the statute, because the defendant here, is an attorney. It appears to me that the case is certainly within the spirit and object of the statute; that being so, I think we shall do well, to exercise the jurisdiction of that jurisdiction which we have over the court, to compel the plaintiff to pay the costs of the action.

BAYLEY J. I think that this case falls within the act of parliament. The plaintiff here has paid the defendant for 500*l*. and recovered only 100*l*. It has been decided to be a case within the statute where the sum recovered is ascertained by the award of an arbitrator. Here the sum recovered was ascertained by the Master's allocatur; the suit then was not a case of non-payment and all the legal consequences that result from the termination of the suit must follow; one of which is that the plaintiff having held the defendant to bail for a larger sum than is actually due, and not having a probable cause for so doing, must pay the costs.

BEST J. (a) I am clearly of opinion that the case is within the words and spirit of the act of parliament. The plaintiff for the plaintiff has not recovered the sum for which he held the defendant to bail; and there is not any reasonable or probable cause for so doing; and the plaintiff is to be held to bail for 500*l*.; and the expression of the statute was to prevent frivolous and vexatious suits.

Ru

(a) Holroyd J. had left the court.

1822.

The King against WILLIAM CLARKE,

INDICTMENT against defendant, a constable within the city of *Bath*, for not obeying an order of the justices of the county of *Somerset*, requiring him, as a constable, to issue out his warrant to the overseers of the poor of the parish of *St. James*, in that city, directing them to collect and levy the sum of 61*l.* for purposes of the county-rate. Plea, not guilty. At trial, before *Holroyd J.*, at the last *Dorsetshire* Assizes, a verdict was found for the crown, subject to the opinion of this Court upon a case which stated, that the city of *Bath* was an ancient city, and had in it a body corporate, and possessed many franchises, partly by prescription and partly by charter. By a charter, in the reign of Queen *Elizabeth* granted to the mayor, &c. of the city a prison for keeping all prisoners, committed in any sort howsoever, within the liberties of the said city and the precincts thereof, for any matter, cause, or thing, which ought to be enquired, prosecuted, punished, or determined in the said city: but if any person should be committed for any cause which ought not to be so enquired, &c., then the mayor, &c. *should have power to commit such persons to the common gaol of the county of Somerset.* It further provided, that the mayor, &c. *should have power to arrest and examine all felons, thieves, and other malefactors, found within the city, and commit them to the county gaol.* By another charter, the bailiffs of the city were to have returns of writs, and of all attachments, arising within the city; with

2024.55

1822.

Saturday,
May 4th.

The proviso in 55 Geo. 3. c. 51. s. 1. stating that that act shall not give any jurisdiction to the justices of the county over any places situate within the limits of any liberties or franchises having a separate jurisdiction, is confined to franchises having a separate jurisdiction co-extensive with that possessed by the county justices; and, therefore, where the justices of the city of *B.* had no jurisdiction by charter to try felons, it was held that the city of *B.* was liable to the county rate.

1829.

The King
against
CLARK.

with a non-intromittas clause to the sheriff. By another, the mayor, &c. were to have all pleas and actions personal, and the recorder and two of the aldermen, were made justices, and any three or two of them (of whom the recorder was to be one) were to have full power to enquire, by the oath of honest and lawful men, of all trespasses, forestallers, regraters, and other offences committed in any manner or sort howsoever, and of all those who go or ride without licence, and of all those who lie in wait to murder, and of all such as offend in the abuse of measures, and in selling of victuals; and to view, control, and inspect all indictments concerning the premises, and to hear and determine the same, in such manner as the justices of the county might hear and determine such matters before them; and also that they should enquire, hear, handle, judge, and determine singular other trespasses, offences, defects, which belong or appertain to the office of the peace, committed within the city of London, and largely, and in as ample manner as other justices of the peace in any other county or town should have power to hear and determine. The justices of the county of Somerset, or any of them, should not, at any time thereafter, intrude, nor to meddle with any the aforesaid things, trespasses, defects, offences, or other articles within the said city, but only in default of the mayor, &c. The charter then ordained that the

city should be clerk of the peace there; that the
 should be the coroner, and that the mayor,
 en, &c. should appoint a chamberlain and re-
 and constables and other inferior officers, within
 y. These charters were accepted, and are still in
 The boundaries of the city, as described in the
 of *Elizabeth*, contained within them three entire
 es, namely, the parish of *St. Peter* and *St. Paul*,
 rish of *St. Michael*, and the parish of *St. James*;
 ey contain also a part of the parish of *Walcot*,
 latter parish, although partly within and partly
 at the city, has but one set of overseers, and one
 -rate for the whole parish. At the time of issuing
 delivering the warrant to the defendant, the mayor,
 er, and two aldermen of the city, duly nomin-
 ad elected, were justices of the peace in and for
 id city, pursuant to the charter of *Elizabeth*,
 ere was no default of a mayor, recorder, and two
 en, as such justices, and the quarter sessions were
 rly held. The corporation, out of their own
 have built and repair the bridge within the
 alled *The Bath Bridge*, and also the city gaol, of
 they appoint the chaplain, the surgeon, and the
 , and pay their respective salaries, and the ex-
 of the prisoners committed thereto; they also
 and repair the guildhall, where the city sessions
 gularly held, under the charter of *Elizabeth*, and
 all the public business of the city is transacted;
 also pay the expenses of committing and conveying
 ers to the county gaol for trial for felonies and
 offences committed within the city, and which are
 ognizable by them, all expenses of a like nature
 ed without the city being paid out of the county
 rate.

1822.

—
 The KING
 against
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rate. The licences of all public houses were also granted by the city justices; the own coroner: the fees and expenses of his the expenses of passing vagrants, are reserved by the entire parishes, and also by the parish of *Walcot* which lies within the city. The city justices exercise the same power as the entire parishes. Before making the question, and delivering the warrant to the county justices had never rated the city any of the entire parishes lying within the county rate; but they have rated the entire *Walcot* to the county rate, without making distinction between the in part and out of the county. Previously to the passing of the act 58 G. 3. the expenses for the prosecution of felons for crimes committed within the city, were paid by the treasury of the county of *Somerset*, out of the general rates of the county, but immediately after the passing that act, the same thence until the making of the rate in question. Orders were made at the sessions and at the churchwardens and overseers, &c., for the payment of the expenses of prosecutions of felons committed within the city, all of which said orders were discontinued, but as soon as the rate was made, which was then, all the parishes within the city of *Bath*, such orders were discontinued, and the expenses of such prosecutions were again ordered to be paid out of the rates of the county at large. The county justices, until the making of the rate, and warrant before mentioned, had never in any respect interfered, or attempted to interfere in any matter appertained to the office of justice of the peace within either of the said entire parishes, or

part of the parish of *Walcot*, but they have rated the parish of *Walcot*, without making any such distinction as aforesaid. The number of prisoners sent to county gaols by the city justices is considerable, and the keeping and maintaining such prisoners, after they are delivered by the city officers at the county gaols, together with the charges of their conveyance to and from the gaols and quarter sessions, together with the expenses attendant on carrying their several sentences into execution, have always been and still are paid out of the general county rate.

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against
CLARKE.

dam, for the Crown. The city of *Bath* is within the jurisdiction of the county magistrates, for, by the charter, the city magistrates have only the power of trying trespasses, forestallers, regraters, and other offences. These were the offences cognizable in the court of the leet, and the rule is, that in construing the words, they cannot be held to include felonies, which are offences of a higher nature. In general, however, a power of holding quarter sessions is given by charter, the power of trying felonies is expressly not given, as appears from the charters of *Nottingham*, *Leicester*, and *Leicester*, set out in *James v. Green* (a) *Wetherhead v. Drexley* (b), and *Bates v. Winstanley*. (c) Even if so, the city of *Bath* is not a separate jurisdiction, within 55 Geo. 3. c. 51. He was then stopped by the Court.

Gaselee, contra. Here, by the charter, the city magistrates have an exclusive jurisdiction as justices of the

(a) 6 T. R. 230.

(b) 11 East, 169.

(c) 4 M. & S. 429.

peace;

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The King
against
CLARKE.

peace; for the words are, that they are to handle, judge, and determine of all and sundry trespasses, offences, defects, and articles to the office of a justice of the peace largely, and in as ample a manner as any of any county in *England*. The right of a justice of the peace is not incidental to the commission of the peace, and as justices of the peace alone possess such power; it arises from the clause or proviso inserted in the commission. If a justice simply stated that *A. B.* should be a justice of the peace for the county of *Somerset*, he would not possess any such power. Here the justices for the county of *Somerset* have exclusive jurisdiction, for within their limits the justices have no power, as justices, to exercise jurisdiction in the city of *Bath* is, therefore, within the limits of the county, having a separate jurisdiction, and is not within the proviso in the first section of the 5th Geo. 2. c. 28. s. 7., which is verbatim in the 55 Geo. 3. c. 51. s. 24. By the 13 Geo. 2. c. 18. s. 7., which is verbatim in the 55 Geo. 3. c. 51. s. 24. cities have separate commissions, and are not within the jurisdiction of the commissions of the peace of the county, they are to be allowed to collect the rates of the nature of county rates; and in *Weatherhead v. The Mayor of Derby* it was held, that they might make a rate under this provision [*Abbott C. J.* said, that in the charter the justices had a power of overseeing the city of *Derby* as to felony.] Here the city of *Bath* is not within the commission, and is not within the jurisdiction of the peace, using that expression in its strict sense. The 55 Geo. 3. c. 70. s. 9.

our of the defendant, and may be considered in respects as a legislative exposition of the 55 Geo. 3.

For it is enacted, that all the costs, charges, &c. relating prosecutions for felony, shall be raised by a rate in those places which are there described being "cities, towns corporate, and places which do contribute to the payment of the county rate, and no town rate or public stock." Now, *Bath* comes fully within this description according to the statement in the case. [Abbott C. J. That act only provided for the expenses of the trial. The costs of maintenance in gaol, and other incidental expenses, are still provided for. Bayley J. We must construe the 55 Geo. 3. c. 51. as if the case had come on before the 55 Geo. 3. c. 70. was passed. This latter act cannot be taken as a legislative exposition of the former. If it were so, it would not, in this case, for the reason pointed out by my Lord Chief Justice, give a remedy inconsistent with the evil.] Here the justices for the county could issue no process within the limits of the county, *Talbot v. Hubble*. (a) As, therefore, the ordinary jurisdiction of justices of the peace was taken from the county magistrates, this must be considered as the case of a franchise having a commission in its own right, and not subject to the jurisdiction of the justices of the peace for the county. In that case the act lies within the 24th section of the 55 Geo. 3. c. 51.

ABBOTT C. J. I am of opinion, that the city of *Bath* is not liable to contribute to the county-rate, and that in this case, our judgement should be for the crown. The decision depends on the construction to be put upon the

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THE KING
against
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(a) 2 Str. 1154.

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55 G. 3. c. 51. s. 1., by which a power is given to the justices of the county, to tax every parsonage or other place, whether parochial or not, within the respective limits of their county. The first question, therefore, which arises is, whether the city of Bath be within the limits of the county of Somerset. From the statement of the case; that the power of trying felonies committed within the county is, therefore, clear, that Bath is within their jurisdiction. Then comes the proviso, that the act shall not give any jurisdiction to the justices of the county over any places or lands within the limits of any liberties or franchises having a separate jurisdiction. Then is the city of Bath mentioned as "having a separate jurisdiction?" I think these words must mean, "having a separate jurisdiction extensive with that possessed by the county." Here it is clear, that the justices of Bath have no jurisdiction: for their jurisdiction is limited to the city of Bath, and Elizabeth confined to such trespasses, and articles, which do or may belong to the jurisdiction of justice of the peace. It is clear from the case, that it does not extend to felony, and therefore is not extensive with that of the county justices. The case does not fall within that part of the proviso, but the proviso goes further, and speaks of places before the act were "subject to rates or county rates, or which were exempt from rates of the county, either in the whole, or in part, by any grant, charter, or local act of parliament." It is clear from the case, that the city of Bath was not subject to any rate, nor was it a county rate, nor do I find it stated, that

ted by any grant, charter, or local act of parlia-

Upon the whole, therefore, I am of opinion, the city of *Bath* does not fall within the proviso. Does the 24th section, as it seems to me, carry the any further, for that clause only applies to such as have commissions of the peace within themselves, and are not subject to the jurisdiction of commission of the peace for the counties in which. Here, the city of *Bath* was, in my opinion, not to that jurisdiction, and our judgment, therefore, be for the crown.

LEY J. I am of the same opinion. The county is appropriated to certain specific purposes, and the object of the statute 55 G. 3. c. 51. being to have a rate equal rate, it seems to me, that all ought to contribute to it who derive a benefit from it. Now, one purpose of the rate is to maintain felons in gaol, in this case, persons imprisoned for felonies committed in the city of *Bath*, are maintained out of the rate for *Somersetshire*, and according to justice, therefore, the city of *Bath* ought to contribute. The question is, whether *Bath* be within the limits of jurisdiction of the county magistrates. Now *primâ* their jurisdiction is co-extensive with the county, they are excluded from any franchise to a limited extent, they still continue to have jurisdiction there, so long as they are not expressly excluded. From the facts of the case, it is clear, that the county justices have jurisdiction within the city of *Bath*, as far as the felonies there committed. Then does *Bath* come within the proviso? I think not. The separate jurisdictions there mentioned, mean such as are co-extensive with all the purposes for which the county

1822.

The King
against
CLARKE.

1822.

The KING
against
CLARKE.

rate is payable, and extend to all the crimes committed by the county magistrates have jurisdiction over the case here. There ought, therefore, to be a judgment for the crown.

HOLROYD J. concurred. (a)

Judge

(a) Best J. was in the Bail Court.

Tuesday,
May 7th.

DOWNES against RICHARDSON and
signees of the Estate and Effects of
JEREMY THOMPSON, a Bankrupt.

Three persons joined as drawer, acceptor, and first indorser, in making an accommodation bill; and it was afterwards issued for value to J.S. Previously to its being so issued, its date had been altered: Held, that the acceptor, having assented to the alteration when he was informed of it, it was no answer to an action on the bill against him, that the bill had been so altered without the consent of the drawer and first indorser, and that a fresh stamp was not

necessary in consequence of such alteration, the bill having been altered in point of law. An accommodation bill is not issued until it is in the hands of a person who is entitled to treat it as a security available in law.

THIS was a feigned issue directed by the court, to try the question, whether the bill was payable to the plaintiff, or to the defendant, before and at the time of its issue. The plaintiff, Thompson, before and at the time of its issue, was indebted to the plaintiff upon a bill of exchange bearing date the 16th of March, 1818, payable to Rains upon, and accepted by the bank of Rains upon, and accepted by the bank of Rains upon, payable to Rains's order, six months after date, indorsed by him to the plaintiff. At the trial, before Abbott C. J. at the London adjournment, in the Hilary term, 1820, a verdict was found for the plaintiff, subject to the opinion of the Court on the case:

The bill of exchange appeared to be payable to the plaintiff, on the 16th of March, 1818, and purported to be payable to Joseph Lachlan, as well as by J. S. Rains, as drawer and indorser, and of J. Lachlan as indorser, and of J. Lachlan as indorser,

proved to be of the hand-writing of these parties
 respectively. *Rains*, *Thompson*, and *Lachlan* had been
 time before the drawing of this bill, concerned
 in bill transactions; *Rains* being generally the
 party. The bills to which they were parties, were
 for the accommodation of *Rains*, but not solely;
Rains and *Thompson* had also some accommodation
 from them. As the bills became due, *Rains* was to
 pay and provide for them, for the bills accepted by
Rains, he was to draw on *Lachlan*, and for the bills
 accepted by *Thompson*, he was to draw on *Thompson*.
 When the bills became due, *Rains* provided for them by
 paying. The bill in question, was drawn, accepted,
 and indorsed in the course of these dealings. The body
 of the bill was written by one *James Sims*, who was
 employed to assist *Rains* in his cash transactions; *Sims*
 was not employed by *Lachlan* or *Thompson*. It had
 been agreed between the parties, that they would not
 draw bills unless they came through *Sims*. The bills
 were sometimes accepted in blank. After they were
 filled up and accepted, they were sometimes in the
 hands of *Sims*, and sometimes *Sims* handed them to
Rains, and either *Rains* or *Sims*, as the case might be,
 delivered them to one *Becher*, a commissioned agent or
 broker, for the purpose of their being delivered out
 into the world, and *Becher* usually purchased goods
 with them. The bill in question was filled up and
 accepted by *Sims*, on the 6th March, 1818, and was then
 indorsed by *Thompson*, and indorsed by *Rains* and
Lachlan. On the 9th March, *Sims* wrote and delivered
 to *Thompson* and *Lachlan* written statements, mentioning
 particulars of the bill, and that it would fall due on
 the 1st September following. The bill at that time was

1827.

—
 Debits
 against
 RECHAMBER.

1822.

DOWNES
against
RICHARDSON.

dated *March* the 6th. Immediately after *Sims* delivered the bill to *Rains*, and the latter to *Becher*. The bill was delivered on the 6th by a clerk of *Becher's*, to one *Howell*, in payment and delivered by him to *Becher*. The bill bore date, *March* the 16th. It was afterwards received by the plaintiff from *Howell* *bonâ fide*, and for consideration. *Lachlan* never gave assent to the alteration, which was not in the hands of *Howell*. On the 13th *April*, a note was sent by *Sims* to *Howell* stating the periods when several bills received by him on the month of *March* would become due. He stated, that the 1000*l.* in question would become due on the 19th of *September*. *Rains* and *Thompson* returned to the country for *America* in the month of *March*, and have not since returned; and about two or three weeks before *Rains* left *England*, and before the bill was altered, *Thompson* called upon *Howell*, who the plaintiff is the holder of it, to answer some enquiries made respecting it. *Howell's* clerk asked him whether it should be paid, and he said, that it would. The plaintiff set out the following facts specifically upon question put to them by the Lord Chief Justice: That the bill had been altered after it had been accepted, and indorsed by *Rains*, *Thompson*, and *Howell*; that the alteration was without the knowledge of *Lachlan*; that the alteration was without the previous assent of *Thompson*; that *Thompson* was informed of the alteration, afterwards, and that while the bill remained in *Howell's* hands, it was now argued by

Tindal, for the plaintiff. The bill was issued to *Howell*, a *bonâ fide* holder, who

city; and, therefore, any alteration before that time not avoid it. It is clear, that an accommodation-bill may be altered before it is negotiated. In *Bowman v. Nichol* (a), it must be taken from the statement, that the bill was given for value; and if so, the alteration made after it had been accepted and delivered to the drawer, and when it was therefore an available security. In *Cardwell v. Martin* (b), the respective bills were considered to be issued as soon as the exchange of the acceptances had taken place. So, too, in *Bathe v. Taylor* (c), the bill was accepted for a debt which the acceptor owed to the drawer, and was, therefore, a valid security. So, in *Stanton v. Hastings* (d), the bill was accepted on account of a bona fide debt, due from the drawer, and Lord Mansfield expressly states, that it was an existing instrument before the alteration. Now, here, as between *Lachlan, Rains, and Thompson*, this was a mere accommodation-bill. No action was maintainable upon it until it passed into the hands of *Howell*, and before that time the alteration had taken place.

Campbell, contra. 1st, At common law no action could have been maintained by *Downes* against *Thompson* upon this bill. 2dly, If it was an accommodation-bill, it required a new stamp. 3dly, This was not an accommodation-bill. 4thly, It was not altered until after it had been negotiated. As to the first point, no action could be maintained at common law by the plaintiff, as acceptor, against the defendant, as acceptor of this bill. The bill was originally dated the 6th March, and was altered, without the consent of *Rains*, the first indorser, or of

1822.

DOWNES
against
RICHARDSON.

(a) 5 T. R. 557.

(b) 9 East, 190.

(c) 15 East, 412.

(d) 4 Camp. 223.

1822.

Dever
against
Bromfield

Lashley, the second indorser. Now, if *Dever*, it would have been necessary to declare, that *Rains*, the payee of the bill, indorsed it. *Rains* and *Lashley* indorsed it, while it bore date the 6th March, they never indorsed a bill bearing date the 1st of April, and, consequently, the allegation in the declaration, that they indorsed a bill dated the 1st of April, would not be supported. 8dly, But even if it was an accommodation bill, as between *Rains* and *Lashley*, still, as it once existed as a bill, according to the intention of the parties, it became, by the alteration, a new bill, and required a fresh stamp. It is true, that in *Osborne v. Roberts* (a), it was held, that where a bill, originally made payable to the defendant, was altered, it might be altered without a fresh stamp, and there was no mistake: the instrument was according to the original intention of the parties. In *Culbert v. Roberts* (b) it was expressly held, that an accommodation bill, payable to the drawee, might be altered after acceptance and before negotiation. 8dly, This was not an accommodation bill, it was a bill accepted by *Thompson*, in the course of dealing between the parties; and it is not a fact, that the bills were chiefly for the use of *Rains*, but not solely; *Lashley* and *Dever* were accommodation bills. They derived any benefit from the bills, the question is immaterial, and it must be taken as stated in this case, that this bill was accepted by *Thompson* for some other bills, which

(a) 5 Rep. 216.

(b) 5 Rep. 216.

d; and, if so, then this must be considered as
 e of an exchange of acceptances, and it falls
 the principle of the case of *Caldwell v. Mar-*
 4thly, At all events it had been negotiated be-
 was altered. *Thompson* did not give his assent
 alteration till the bill was in the hands of *Howell*,
 fide holder for value. The legal effect, therefore,
 me as if *Thompson* had then, with his own hand,
 the date from the 6th to the 16th; in which
 e bill would unquestionably have been void.

1822.

DOWNES
 against
 RICHARDSON.

OTT C. J. I am of opinion that the plaintiff is
 to recover. If we were to yield to the objection
 part of the defendant, we should open a door to
 aud. At common law it is clear that this would
 did instrument, as against the acceptor, having
 tered by his consent; but the difficulty arises
 e act of parliament, which requires that every
 exchange shall have a stamp. The question
 whether this alteration made it a new bill?
 undoubtedly, when an accommodation bill has
 nes of the different parties written upon it, it is,
 e sense of the word, a bill of exchange; but it is
 unavailable as a security for money, until it is
 o some real holder for a valuable consideration.
 is said that this was not an accommodation bill.
 appears there were three persons concerned to-
 and acting different parts in these bill trans-
 ; one of them drew, another indorsed, and a
 ecepted these accommodation bills; and it appears
 as, a clerk, was principally entrusted with the
 ion of this paper for the benefit of all. This,

(a) 9 East, 190.

1822.

DOWNES
vs
RICHARDSON

therefore, is nothing like the exchange of *Cardwell v. Martin*, referred to in argument to me, therefore, on the facts of this case an accommodation bill, in the strictest word, and that the original parties to the instrument inter se. This being the instrument, it follows that till it was an unavailable instrument; and came a bill of exchange when it was issued for a valuable consideration. At that time it had been altered, and on the 19th of May appears, that, in a letter from *Sims* to *Thompson* was informed of such alteration having been made. Under these circumstances, and with *Thompson* is asked by *Howell's* clerk (then in *Howell's* hands) whether the bill would be assented to. *Thompson* then stated that it would be assenting to the alteration that had been made. Therefore, of opinion that, as against *Richardson* the instrument, and that he cannot now object to it. For these reasons it seems to me that *Richardson* is entitled to the judgment of the Court.

BAYLEY J. I am of the same opinion. The alteration of an instrument vacates it, but taken with this qualification, that the alteration is made out the consent of the party to be bound. *Thompson* has assented to the alteration, and he cannot object to it on this ground. The question arises as to the provisions of the Act. Now if an alteration be made before the bill is stamped a fresh stamp is not necessary. The bill is then issued. I am of opinion that it is issued by some person who can make a valid stamp.

if it remains in the hands of the original drawer, 1822.
 with names upon it, under such circumstances as
 he cannot have any legal claim upon those per-
 sons, the bill is not issued. Here it was clearly an
 accommodation bill drawn by *Rains* upon *Thompson*,
 and indorsed by *Lachlan* and those parties could
 have a valid claim upon it inter se. It was, I
 think, not issued until the 10th of April, when it was
 issued to *Howell*, but at that time the alteration was
 made. This bill, therefore, was altered before it was
 issued, and no new stamp was necessary. But it is said,
 that, inasmuch as *Thompson* did not assent to the altera-
 tion until after the bill was in *Howell's* hands, he is
 discharged. The fallacy is in considering the assent to
 the previous alteration as an alteration of the bill de-
 void at that time; but that is not so. The alteration
 vacated his acceptance, and gave him a right to say,
 "my name is off the bill;" but he may waive the benefit
 of such an objection, and I think he has done so, for I
 consider his assent as equivalent to a new acceptance. (a)
 I think, therefore, that the plaintiff is entitled to
 judgment.

HOLROYD J. I am of the same opinion. Independ-
 ently of the stamp-act, it is clear that the acceptor
 could be liable; for when he assented to the alteration,
 it is as if his acceptance had been originally made sub-
 sequently to that alteration; for his assent operates as a
 fresh acceptance of the bill. As to the other point, I
 am of opinion, that a fresh stamp was not necessary,
 because no one could have maintained an action upon
 the bill, until it came into the hands of *Howell*.

(a) If the bill had been made after the passing of 1 & 2 W. 4. c. 79. s. 2.
 which requires the acceptance to be in writing, could the plaintiff have
 recovered?

BEST

1822.

Downes
against
Richardson.

BEST J. I am of the same opinion that if this objection were to prevail, encouraging the fabrication of accompaniments we should be allowing parties to make alterations made by themselves. And when the alteration was made, the bill was in form, but it did not constitute a bond between the parties. A bond is, in form, made before delivery; but still an alteration after delivery will not vitiate it. So again, in *Car v. Troy*, the bill was called before the bill is issued. Here the bill was made before the bill was issued to *H*, and afterwards assented to by *Thompson*; and is bound by it.

Judgment

Tuesday,
May 7th.

BONNER against WILKINSON, Executor of
WILKINSON, deceased.

In an original writ the defendant was described as *T. B. of C. in the county of N.* upon a writ of error, brought to reverse the outlawry; the error assigned was, that *T. B.* was not, before or at the time of the original writ, of or conversant in *C.* aforesaid, and that there was not any town, hamlet, or place in that county. Plea to this assignment of errors, that plaintiff procured with intent to declare upon a bond made by the defendant, by which he was bound, that *T. B. of C. in the county of N.*; Held, that this was an estoppel.

THIS was a writ of error, brought to reverse the judgment of outlawry. In the original writ the defendant was described "*Thomas Bonner of Callerton, in the county of Northumberland.*" The errors assigned were, that the defendant was described in the original writ by the name and addition of "*Bonner, of Callerton, in the county of Northumberland.*" that he was not, before or at the time of the original writ, of or conversant in *C.* aforesaid, and that there was not any town, hamlet, or place in that county. Plea to this assignment of errors, that plaintiff procured with intent to declare upon a bond made by the defendant, by which he was bound, that *T. B. of C. in the county of N.*; Held, that this was an estoppel.

original writ, of or conversant in *Callerton* aforesaid, that there was not any town, hamlet, or place of the name of *Callerton* in that county; although there are three distinct townships, called *Black Callerton*, *High Callerton*, and *Little Callerton*, in that county; and the said *T. Bonner* was, at the time of issuing the writ, of or conversant in the township of *High Callerton*, and that he was not so described in the original writ; and, therefore, there was no addition in the original writ of the town, hamlet, or place, of which *T. B.* was of or conversant. To this assignment of errors, the plaintiff pleaded, by way of estoppel, that he procured his writ with intent to declare thereon against *Bonner* upon a bond made by him, in the lifetime of the testator, on the 30th *March*, 1803, and by which the defendant was described as *Thomas Bonner*, of *Callerton*, in the county of *Northumberland*. To this plea the defendant demurred.

Littledale, in support of the demurrer. The statute *1 Hen. 5. c. 5.* requires, in every original writ on which a writ of *habeas corpus* shall be awarded, that, to the names of the defendants, additions shall be made of their estate or degree, of their trade, and of the towns or hamlets, or places, and the counties of which they were or are, or in which they were or were conversant. And if, by process upon the original writ, in which the said additions be omitted, a writ of *habeas corpus* be pronounced, that they be void. Now, in the original writ in this case, the defendant is not described as of any town or hamlet; for the court cannot intend *Callerton* to be a vill. *Bowes* *Place*. (a) It may be the name of the house of the

(a) 5 Taunt. 32.

defendant,

1822.

BONNER
against
WILKINSON.

1622.

Rever
against
Warrant.

defendant, but that will not satisfy the statute; for the term "place," coupled and "vill," must mean something more than a house. But it is to be contended, that he is estopped from taking this objection. *Abr.* 683. it is laid down, "if a man be bound by name of *J. S.*, of *D.*, yet there are two *D.*'s in the same county, this stands with the deed, for he acknowledges, and more; and 14 *Hen.* 6. 8. *Bro. Abr.* tit. *Estoppel*, pl. 16. debt upon *B.*, late of *D.*, he said that he was never to this the plaintiff said, that to this he received, for he is bound by the name and the best opinion was, that the obligation stood in this point, for nothing is effectual to oppose but the name and the surname. And in folio 38. it is said there, that it was adjudged no estoppel. In *Bro.*, *E.* it is laid down, that "where a man is outlawed, that he is of *W.* that he was dwelling at *D.*, he shall be estopped to say no such vill as *D.* in the county; for the confession of a thing material, shall not be estoppel; and 22 cited. And in pl. 156. this case is stated. *R. H.*, of *E.*, in the county of *O.*, upon the defendant said that in the same county *Over E.* and *Nether E.*, and none without the other would have estopped him by which shall be intended his deed, till And, by the best opinion, it is no estoppel with the obligation; for he says so much, he shall be estopped to say, no such vill, he

in the same county; and 5 *Edw. 4. 46.* is cited. (*a*)
 in *pl. 104.*, in debt against *J. S.*, of *D.*, the defend-
 said, that the day of the writ purchased he was
 living at *S.*, and not at *D.*, judgment of the writ; and
 plaintiff pleaded the obligation for estoppel, because
 was bound in the sum by the name of *J. S.*, of *D.*
Prissot. This is no plea; for he may say, not his
 , and, therefore, no estoppel; and so was the opi-
 of the Court; but it seems that the reason of *Prissot*
 not material, for to every indenture which is pleaded
 estoppel, the party may say, non est factum; yet it is
 good estoppel prima facie; but it seems to me the
 on is, inasmuch as it may stand with, &c. for it may
 that he dwelt at *D.* at the time of making the obli-
 on, and that he dwelt at *I.* on the day of the writ
 chased; and 37 *Hen. 6. 5.* is cited.

Tindal, contra. The defendant below is estopped by
 bond; the statute requires that the addition shall be
 the town, hamlet, or place, and the latter word must
 ly something inferior to a town or hamlet. It can-
 be in the mouth of the defendant to say that his
 d does not contain his true description. And in
kings, 163. *pl. 12.* this case is stated: *A.* is bound to
 in an obligation; *A.* is named of *Dale*, without an
 dition; *B.* sues *A.* upon this obligation; *A.* shall not
 received to plead that there is *Over Dale* and *Nether*
le; for the obligation is otherwise, and he shall not
 received to contradict his own deed, but he
 ll be estopped by it: and this is said to have been
 ided by the Justices of both Benches; and
Rich. 3. is cited. And in *Fitzherb., Estoppel, pl. 61.*
 e same point is stated to have been decided by the

1821.

ESTOPPEL
 HENRY
 WILKINSON.

(a) See *Bro. tit. Estoppel, pl. 69. 172. 214.*

1822.

———
Bowyer
against
WALKER.

Judges of both Benches. This, therefore, be a solemn decision, upon conference of the Judges of the two Courts, that this is a *house* and *Rastall's Entries*, tit. *Debt in Courts* is to the same effect. Besides, the Court held *Callerton* to be only a house, because it might have pleaded it not to be a vill.

ABBOTT C. J. It is certainly true that the defendant, by his own private instrument, defeated an act of parliament, but he may thereby have obtained a vision intended for his own benefit. The *abode* serves to distinguish the individual from other persons of the same name. Therefore, before is an important part of his description. It appears from the cases cited, that the court, at the passing of the act, 1 *Hen. 5. c. 5.* that of a bond, in which the party was described as of a given place, did not estop him from saying that he was not of that place. It seems, however, that the court of *Rich. 3.*, on mature consideration, the judges of the courts, upon conference, overruled the decision previously given, and determined the better construction of the statute to be, that a party should be allowed to say that he was not of the place of which he described himself in the bond; and, in *Callerton*, I have always considered that as a settled rule. I think, therefore, the plea to the assignment is a good estoppel, and consequently that the plea of outlawry must stand.

HOLROYD J. (a) I think this outlawry must stand. It appears from the authorities cited in *Callerton*.

(a) *Dwyer J.* was absent.

time of *Rich. 8.* the judges of both courts, upon
 rence, decided, contrary to former authorities, that
 ty should be estopped from saying that he was not
 the place of which he had described himself to be
 s own deed, and from that time it seems to me
 he law has been considered as settled; for, other-
 there would have been subsequent cases on the
 ct. The object of the statute was, that it should
 ar by the description in the indictment or writ,
 person of the particular name it was that was in-
 d to be outlawed. Now, that object would be
 r answered by describing the person as of a
 ular house, than as of a ville or hamlet, for it is
 robable that there should be two persons of the
 name in the smaller than in the larger place.

est J. concurred.

Judgment of outlawry affirmed.

LL against DOE on the Demise of SURTEES
 and Another.

Tuesday,
 May 7th.

IS was a writ of error, brought to reverse a judg-
 ment obtained in ejectment in the Court of Pleas
 Durham. The declaration was on a demise by
 paid on a given day, and in the mean time, that the mortgagor should continue
 session; upon special verdict, it was found that the principal was not paid on the
 day, but that the mortgagor continued in possession. There was no finding by the
 either that interest had or had not been paid by the mortgagor: Held, that upon this
 g, it must be taken, that the occupation was by the permission of the mortgagee,
 consequently, that although more than twenty years had elapsed since default in pay-
 of the money, still the mortgagee was not barred by the statute of limitations:
 id, also, that an entry is not necessary to avoid a fine levied by the mortgagor.

Where premises
 were mortgaged
 in fee, with a
 proviso for re-
 conveyance, if
 the principal

W. Surtees,

1880: *W. Sutton*, on the 24th July, 1817, of a part of certain premises habendum for seven years, &c. A special verdict the following facts: On the 1st May, 1780, *Labour*, being seized of the tenement for, mortgaged them, to *Arthur Sutton*, for 200*l.* with the usual proviso for redemption, if *Labour* should pay *A. S.* the 200*l.* on the 24th December, 1780, and that *Labour* occupy the premises until default had been made. *A. S.* thereby became seignior of the premises, but never entered, and continued to occupy them, until his death on the 30th September, 1800, died intestate, his heir at law. *Thomas Labour* died in June, 1804, and the estate descended to his son and heir at law, who entered and occupied the premises in question, until 1807; then occupied by his mother till her death, in 1807, *Labour*, in October 1806, conveyed the premises for a valuable consideration to *Michael Hall*, of the County of *Durham*, below, and on the 8th October, 1806, a writ of *habere facias possessionem* with proclamations in the Court of Pleas, of the County of *Durham*, of the premises in question, in favour of *Michael Hall*. *M. Hall*, on the 1st of November, 1806, entered and occupied one messuage part of the premises in question, into which *Joseph Labour*, upon the death of *Thomas Labour*, and his wife, occupied the same; and immediately after the death of *Elizabeth Labour*, in September, 1806, *Hall* entered into possession, and occupied the premises in question. *W. Sutton*, &c.

1813, demanded of *Michael Hall* the possession of the same, which he refused to deliver up.

1822:

HALL
against
Doe & Co.
SURREY.

titl'dale, for the plaintiff in error. *William Sartees* is entitled to recover, because he has not brought his action in time. His right of entry accrued on the 3d of January, 1780, when there was default in the payment of the principal and interest. If the interest had been paid from time to time, then indeed the mortgagor could not be considered as holding adversely to the mortgagee. See *Cher v. Fineaur*. (a) But that fact is not found. In *Moyle Finch's* case (b), it is laid down, that a lessee for years, holding over his term, becomes a tenant at sufferance, and shall not pay rent; for it is the folly of the lessor to suffer the lessee to continue in the possession of his premises after his term: and it is clear, in this case, that the mortgagor, not having been paid at the appointed time, the mortgagor was tenant by sufferance; for he came in by a wrongful title, though he held over wrongfully. Then, there being no payment of interest, the mortgagor was by wrong, and consequently the plaintiff ought to have brought his action within 20 years. But, secondly, the plaintiff is barred by the fine, and he ought to have made an entry in order to avoid it. [Bayley J. The fine has no operation; the mortgagor had no freehold; in order to constitute a title by disseisin, there must be a wrongful entry; whereas in this case, there has been at most only a wrongful continuance of the possession.] See *Doe v. Perkins* (c) and *Smartle v. Williams* (d) are authorities expressly upon that point.]

(a) 1 Ld. Raymoul, 740

(b) 2 Term, 143.

(c) 3 M. & S. 271.

(d) 1 Salk. 245.

and does not therefore require an entry to avoid

1822.

HALL
~~against~~
Dor Sem.
Sutcliffe

ROYD and BEST Js. concurred.

Judgment affirmed.

(a) See Coote on the Law of Mortgage, p. 348.

KING against The Steward and Suitors of the Manor of HAVERING ATTE BOWER.

TTY had obtained a rule nisi for a mandamus to the steward and suitors of the court of the lordship of the Manor of *Havering Atte Bower*, in the county of Essex, to receive and admit the plaint of *Wm. Wood George Butcher*, and to issue process from the court thereon, and to proceed to hear and determine the same, pursuant to the charter of 2 Jac. 1. The affidavit set out the charter by which the king granted that the steward and suitors, for the time being, of the court of the Manor of *Havering Atte Bower* (which was of ancient demesne) should have power and authority to hear and determine all pleas by plaintiffs to be levied and prosecuted in the said court, as well as pleas by defendants, in the said court, for pleas, debts, accounts, covenants, trespasses, as well as pleas by force and arms committed as otherwise, detention of chattels, and all other contracts whatsoever, made by the lordship or manor aforesaid made, done, or suffered, although the same debts, &c. do amount to or exceed 40s. The charter had been acted upon, and the court regularly held every three weeks. But by the time it appeared, that the last plaint for a debt or account had been heard and determined in 1776: the last instance of a suit in replevin was in 1790, and in

By charter the king granted that the steward and suitors of a manor should have power to hold a court for the determination of civil suits, and there had been a non-user of the court for fifty years (except for the purpose of levying fines and suffering recoveries). Held, that this Court being for the public benefit, the words of permission in the charter were obligatory; and that the right of determining suits was not lost by the non-user.

Z z z

ejectment;

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THE KING *against* The Inhabitants of St.
AUSTELL.

Wednesday,
May 8th.

MAS CARLYON, Esq., appealed against the
following assessment for the relief of the poor of
the parish of *St. Austell*, in the county of *Cornwall*.
on tin and copper dues, and water-courses.
C. Esq., for *Crinnis* copper dues.

	£.	s.	d.
Annual return, - -	4080	0	0
Amount taken at two-fifths, -	1632	0	0
Assessment at 3s. in the pound,	244	16	0

Sessions amended the rate by striking out this
rent, and stated the following case. Mr. *Carlyon*,
at the time of making the rate, was not an inhabitant
of *St. Austell*, nor the occupier of any land, house, or
property therein, unless he was deemed to be such
in respect of the said dues: as to which
it was shewn, that he being seised in fee of all
the land within which a certain mine was situate,
an indenture made 12th *January*, 1811, between
himself and one *Joshua Rowe*, in consideration of the
sum therein reserved, and of the covenants, &c.
contained, did give and grant unto the said
Rowe, his partners, fellow-adventurers, &c. full
liberty, licence, power and authority, to dig,

and to sell, that for this, his one-eighth share, he was liable to be rated as an occupier
of the land, the reservation operating as an exception out of the demise, and not being of the
nature of a rent.

Where the
owner of the
soil, by inden-
ture, granted to
certain adven-
turers full and
free liberty to
dig, mine, and
search for tin,
tin ore, &c.,
and the same
to take and con-
vert to their
own use, sub-
ject to a reserv-
ation therein
contained, and
to make such
adits, shafts,
&c. as they
should think
necessary :
yielding and
paying to him
one full eighth
share of all
such tin, tin
ore, &c. ; the
same having
been first spall-
ed, picked, or
otherwise made
merchantable,
and fit to be
smelted. And
the indenture
contained a
power either
for payment in
ore, or the
amount thereof
in money,
which had been
acted upon; and
the owner had
received it in

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work, mine and search, for tin, tin ore, and all other metals and minerals, and throughout all that part of his land called *Crinpis*, situate, lying and being in the parish of *St. Austell*, thereinafter limited and described, to take, carry away, convert and dispose of at their pleasure, subject to the reservation contained: and within the limits of the same, to make such adits, shafts, &c. and to work, mine and search, for tin, tin ore, &c. as they should from time to time think fit, to have and to hold unto the said *Thomas Carlyon* and assigns, one full eighth part or share, of all tin ore, copper, copper ore, lead, lead ore, and all other metals and minerals which should or might of the said indenture, be found and gotten, and brought to grass within the limits of the same, granted, during the said term; the said *Thomas Carlyon* and assigns, to first well and sufficiently spalled, stamped or cressed, or otherwise, to separate the several natures thereof, made merchantable, and then smelted and fairly divided, and laid out, at their costs and charges. The indenture contained further covenants, that they would, at the expiration of the said term, pay or deliver unto the said *Thomas Carlyon* or assigns, or his toller or agent for the said term, a full and just one-eighth part, share, of all tin ore, copper, copper ore, lead, lead ore, and other metals and minerals, served; or pay the same in money, at the current price as the same could from time to time be sold, within two months at farthest, after such other metals and minerals should be

resaid; and would give six days' notice in writing to, or his agent or toller, of the time of every mining or division of the tin, tin ore, &c. to be raised or gotten by virtue of these presents: and also, that he would pay all, and all manner of rates, taxes, and assessments whatsoever, which should at any time there- during the term thereby granted, be taxed, levied, assessed, or imposed upon the tin, &c.; and the money which should arise from the sale thereof, or the dues thereby reserved, or upon *Thomas Carlyon* his heirs or assigns, for or in respect thereof, indemnify him from the same; and would effectually clear the premises in the most proper and effectual manner, with as sufficient number of labouring miners, as might be prevented by water or other inevitable impediments. By virtue of this grant or set, the mine had been worked ever since the date thereof, by *Joshua Carlyon* and certain persons or adventurers claiming the same, him, at their own sole risk and expense, by their own labourers, and under the entire direction and superintendence of their own agents, and without any expense, risk, or interference whatsoever, of or on the part of *Thomas Carlyon*. Various shafts, and other works necessary to search for and get the ore had been dug and made, and counting houses and other houses built by the adventurers at a great expense, under and by virtue of the said grant or set, within the limits thereof; and the mine, and the erections thereon, and shafts, levels, and other works within the same, had always, since the working of the said grant or set, been, and still are, in the sole possession and possession of the adventurers. The mine

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is now a declining mine; but considerable copper ores had from time to time been the whole of which, after undergoing several breaking, washing, sifting and stamping, varying according to the quality of the ore 6s. and 7s. in the pound, and, as to the even to 15s. in the pound upon their when cleansed for the purpose of separating earth and other substances, and thereby fit to be calcined and smelted, but by which original and native quality of the ores thus altered, had from time to time, before calcined or smelted, been sold or disposed of by adventurers, sometimes by public, and sometimes by private sale, as and when they thought fit without controul or interference by, or on the part of the parish of *St. Austell*. *Thomas Carlyon*. No part of the ores had been rendered to *Carlyon* in kind; but one-eighth part of the money, from time to time from the sales of the ores, had been paid to him in pursuance of the said indenture. The rate from time to time, rated and assessed to the use of the poor of the parish of *St. Austell*, for such one-eighth part of the money so arising, and had paid the several assessments upon the rate of the rate appealed against.

Wylde, in support of the order of the court in *Lead Company v. Richardson* (a), it was shewn that mines are not rateable goods.

(a) 3 Burr. 1341.

the ground, that coal mines alone having been mentioned in the statute, the rule *expressio unius clausio alterius* applies, and partly because of the attending the working of them. In *Rowls v. (a)*, the person rated was the lessee of the lot and he was rated on the ground, that he was the owner of property to which the risk attending mining operations did not apply. There, too, the persons were acting under a general custom within the district, and not under a specific contract, as here. *Rex v. Baptist Mill Company (b)* was also similar, in both respects, to *Rowls v. Gells*. Here, however, the owner for the first time sought to be rated; unless, indeed, that question can be said to have arisen in *Rex v. Agnes (c)*: where, however, the point was not decided. But the cases of *Rex v. The Bishop of Rochester (d)* and *Rex v. The Earl of Pomfret (e)* are in contrast. Those were both cases of owners letting out property upon a written contract, and the judgment of the Court was against the rate. The owner of a mine in circumstances like the present, may run a considerable risk; for he may be obliged to incur great expense in opening the mine before he lets it to the adventurer, and after having received the rent in ore, he may be at great expense in making the mineral marketable. Here, by the instrument in question, the right of possession in the mine passed to the adventurer, and the landlord, if he entered upon it, would be guilty of trespass; unless, as in *Doe dem. Hanley v. Wood (f)*, he came upon the land for the purpose of re-entry, pur-

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(a) *Couper*, 451. (b) 1 M. & S. 612.

(c) 5 T. R. 480. (d) 12 East, 555.

(e) 5 M. & S. 139. (f) 2 B. & A. 724.

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ants of
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suant to a power reserved. This is in fact of rent, and a rent is not rateable. The native in receiving the rent either in ore and the lord has elected to take it in money. *v. Earl of Pomfret*, it was held, that the ore is not rateable under similar circumstances. It was said that the Court there went upon the ground that the lead reserved had gone through the smelting. Here, however, the ore is to be mined and is not rateable; and it cannot surely depend on the nature of the manufacture to which it is subjected, whether it is rateable or not. This, therefore, although a demise of part of the thing demised, does not constitute an exception, but as a render; and the order of sessions was right.

ABBOTT C. J. I am of opinion that, *Mr. Carlyon* is liable to be rated for the demised portion. I am unable to distinguish this case from *v. Gells* and *Rex v. The Baptist Mill Company*. I think, therefore, that we ought to decide consistently with those authorities. Notwithstanding all that has been urged upon this subject, I cannot distinguish the cases where a party takes an interest in a specific contract, as in this case, and where the work is done under a custom previously existing in the district. The case is distinguishable from *The King v. The Earl of Pomfret* in two respects: because there was an absolute demise in the first case of the mines, under which the possession, both of the mines which was worked and that which was not worked, passed to the lessees: but here there is a demise of part of the mines, and a reservation of part. In the second place, the

red to the lord, in *The King v. Earl of Pomfret*, was melted lead; but here the reservation is of part of native mineral. On these grounds, it seems to me that we ought to decide in favour of the rate; and I do so with the less reluctance, because it is still open to the party to institute an action against the person who levies for the rate, and so to bring the question before a higher tribunal.

BAYLEY J. We ought to lay out of the question the circumstance of this being a failing mine. For it is as beneficial and useful property to the person on whom the rate has been made; and it was held in *Rex v. Croft (a)* that a coal-mine, whether profitable or not, is still rateable. This falls within the principles laid down in *Rowls v. Gells*, *Rex v. St. Agnes*, and *Rex v. The Baptist Mill Company*, and is distinguishable from *Rex v. The Bishop of Rochester* and *Rex v. The Earl of Pomfret*. Here, the person rated is in fact an occupier of the land, and derives a profit in respect of that occupation; and that, according to the doctrine laid down in the first set of cases to which I have referred, makes him rateable; and he has not dispossessed himself of the possession of the land, as was done in the two latter cases. In *Rowls v. Gells* it was first decided, that a party was rateable for lot and cope. It is said, indeed, that the party rated there was a lessee. That distinction makes no difference; for, if the lot and cope had not been rateable in the hands of the original proprietor, it would not have been so in the hands of his lessee. The true ground of that decision was, that the party

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(a) 5 T. R. 593.

was

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was there considered as an occupier of the land. In *v. St. Agnes* proceeded on the same ground. In *v. The Baptist Mill Company*, (at the time of the decision this Court were peculiarly familiar with the words of the act of parliament,) it was determined that the lessees under the lord of the manor of St. Agnes, who had a free share of calamine were liable to be rated as occupiers of land; and the decision went on the ground that the lord of the manor would, but for the act, have been rateable for it also: for the Court considered him as occupying the land by the hands of his tenants and adventurers. The latter were to work the mine and to receive part of the ore gotten, and the Court considered him as joint occupier with them. In *Ex parte Bishop of Rochester*, the mine was let; and, whether worked or not, still the bishop was completely liable for the session of it, and the adventurers worked for the exclusive profit. There, the rent reserved was a third of the rent, and the relation between the parties to the lease was that of landlord and tenant; and all that the bishop of Rochester had was the reversion of the land. In *The Earl of Pomfret*, also, was the main ground of the decision. But, in this case, the Earl has not the sole and exclusive occupation of the land; they have only the sole and exclusive privilege of working it. This is not a conveyance of any interest in the mine till it is actually worked. It is only a privilege for ore, and then only on the terms of leaving a certain portion of that ore in a fit state for the landowner. It seems to me, therefore, that, according to the principle to which I have referred, Mr. Carlyon must, in this case, be considered as the occupier of land; and that he is liable to the present rate.

HOLROYD J. In the view I have taken of this case, entirely agree with the rest of the Court. The case of *Wells v. Gells*, although it was doubted by Lord *Kenyon* *Rex v. Parrot*, seems to me to have been well decided. It was confirmed by *Rex v. The Baptist Mill Company*, in which I cannot distinguish this case. The case of *Rex v. The Earl of Pomfret* is distinguishable on the grounds already stated.

BEST J. If it were true that we must either overrule *Rex v. The Baptist Mill Company*, and the cases confirming that decision, or the case of *Rex v. The Earl of Pomfret*, I should be inclined to support the former. But it is not necessary, inasmuch as there is a material distinction between them. Here, it seems to me to be clear, that Mr. *Carlyon* is an occupier of land. For the mine is not in the exclusive occupation of the adventurers; and whatever, by the indenture, is not granted out of Mr. *Carlyon*, remains in him. All that the adventurers take under it is a licence to enter and dig, and take away the minerals. But when they have done so, and the minerals are brought to grass, a division of the ore between them and the landlord takes place. This, then, is the same as if, instead of working for wages, they worked on condition of being paid by a certain share of the produce. In this case, therefore, the rate must be supported.

Order of Sessions quashed.

Gurney and *Adam* were to have argued on the other side.

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ants of
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Wednesday,
May 8th.

DUNCAN against STINTON

A motion for security for costs, on the ground of the plaintiff's residence abroad, cannot be made if the defendant has taken any step in the cause subsequently to his becoming acquainted with the fact of plaintiff's being resident abroad, and therefore the affidavit in support of the motion, if made after plea, must expressly state that defendant was not acquainted with it when he pleaded.

CAMPBELL had obtained a rule nisi for staying proceedings till security given. It appeared that the plaintiff gave security on the 10th of March, 1821, and that this action was brought in November following, against the defendant on a bill of exchange. The defendant pleaded on the 16th April last; and, on the 30th of April, a motion for security for costs was made to the plaintiff's attorney, and refused. It was not sworn to by the plaintiff's attorney, nor was an affidavit taken for the rule that the defendant did not give security of the action brought, or when the plaintiff knew of the plaintiff's being abroad.

Comyn shewed cause, and contended that the plaintiff's security was not sufficient; and he referred to the decision in *Lord Waterpark*, in Easter term, 1821, where several cases on this subject were reviewed by the court, and the rule laid down, that a party is bound to give security for costs as early as possible; and if he does so after plea, he must state in his affidavit that at the time he pleaded he was not aware of the plaintiff's absence from this country.

Campbell, contra. The general rule is, that a party may apply at any time before judgment. In *Du Belloir v. Waterpark* the plaintiff gave security and had been so for twenty years before the action was brought; and that fact must have been

defendant. Here, it does not appear that the defendant
 v any thing about it.

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DUNCAN
 against
 SAINT.

per Curiam. The rule was laid down, as stated in
Belloix v. Lord Waterpark, that when a cause is
 ling, a party, if he means to apply for security for
 t, must take no step after he knows that the plain-
 s'out of *England*; for a defendant ought not to wait
 l expense has been necessarily incurred, which must
 uently be the case, particularly in actions of trespass
 replevin. Under the present circumstances, how-
 e, we will give leave to the defendant to file, if he
 a supplementary affidavit, stating that, at the time
 pleaded, he was not acquainted with the plaintiff's
 nce from this country. If that affidavit is not filed,
 rule must be discharged.

Rule accordingly.

GROTTICK *against* BAILEY.

Wednesday,
 May 8th.

READER had obtained a rule for setting aside the
 proceedings on the bail-bond, in this cause, on
 ment of costs, bail above having been justified. The
 lavit of the defendant, in support of the rule, only
 ed, that he had a good defence to the action.

On motion for
 setting aside
 proceedings on
 the bail-bond,
 bail above
 having justified
 the affidavit,
 must state that
 the defendant
 has a good de-
 fence upon the
 merits.

aves, on shewing cause, objected, that this affidavit
 insufficient, in not having stated that the defendant
 a good defence on the merits.

The Court were of this opinion; but the rule was
 rwards made absolute, upon terms.

Rule absolute.

1822.

*Wednesday,
May 8th.*LEWIS *against* GADDERRE

Where bail are rejected on account of the insufficiency of one, the bail-piece becomes a nullity, and, therefore, the notice should be for putting in and justifying bail, and not of adding bail.

IN this case the bail appeared on a foot were rejected, on account of the insufficiency. A fresh notice was then given, that *John* be added to the bail already put in for and that he, together with *J. W. Snell*, already put in, and who was one of the before offered to justify with the one who was rejected, would justify on *Wednesday* the 8th.

Reader objected, that the notice was not good, because the former bail having been rejected, the bail-piece was a nullity. A new bail-piece was required; and the defendants were bound to put in and justifying bail, and not to add.

F. Pollock, contra, contended, that the notice was good, because they were good for the purpose; and, therefore, there was something to be said for it.

HOLROYD J., after having taken time to consider, said, that he had consulted the other Judges of the Court, and that they were of opinion that the notice was a nullity; and, consequently, that the bail was insufficient.

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ENCE and Another against JONES, Esq.

Friday,
May 10th.

BT, brought by the plaintiffs in *Easter* term last, against the defendant, the marshal of the *Marshalsea*, for the escape of one *White*, committed to the custody of the defendant in execution. Plea, general issue. Trial, before *Abbott C. J.* at the *Middlesex* sittings *Michaelmas* term, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:

Trinity term, 1820, *White* was duly committed to the custody of the defendant in execution. On the 1st day, 1821, a commission of bankrupt was issued against *White*, under which he was declared a bankrupt, and a usual advertisement was inserted in the *London Gazette*, requiring him to surrender himself to the commissioners on the 2d and 9th days of *June*, and on the 9th day of *July* then next, at twelve o'clock at noon on each of the said days, at the *Guildhall, London*, and make a full discovery and disclosure of his estate and effects; and on the last sitting the bankrupt was required to undergo an examination. On the 8th *June* the commissioners issued a warrant to the defendant, as such bankrupt, *White* then being in his custody, requiring him to bring the bankrupt before them on the following day, the 9th *June*, in order to be examined touching his discovery of his estate and effects, according to the provisions of the several acts of parliament in that case made and provided. In compliance with this warrant the defendant, on the 9th day of *June*, brought

The commissioners of bankrupt are authorised by the 49 G. 3. c. 121. s. 13. to bring up a bankrupt, charged in execution, for the purpose of a full disclosure of his estate and effects at any of the three meetings under the commission, or any adjournment thereof.

V.

3 A

White

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 SPENCE
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White before the commissioners at *Guilford* he was there, and before his return into King's Bench prison, this action was filed the bill against the defendant. He passed his last examination on that day; being brought before the commissioners, he was carried to King's Bench prison by the defendant. He continued in such custody from that time until he was carried before the commissioners by similar warrants, on the 7th of *July*, and on other times between that and the 1st of *August*, when he passed his last examination.

Parke, for the plaintiff. The commission has authority to bring the bankrupt before the commissioners on the 1st of *June*, which was the day appointed for the examination, and, consequently, the fact of his being brought before the commissioners on that day constitutes an escape, and renders him liable in this action. The question depends on the statute 49 G. 3. c. 121. s. 13., which enacts, "That any inconveniencies had arisen from the practice then existed, of the attendance of bankrupts in prison, to take the examination, the commissioners charged in execution, enacts, "That any bankrupt, being in custody at the time of his examination, although charged in execution, shall be brought before the commissioners to be examined by the same manner as was then practised with respect to persons in custody on *meane process*." It is clear, from the very words of the statute, the power of the commissioners is confined to the case of bankrupts at the time of the last examination; and an escape cannot be rejected. By statute 5 G. 2.

ners were obliged to go to the prison and examine
 bankrupt charged in execution. And the legislature
 intended by the statute 49 G. 3. c. 121., that
 the last examination the creditor should have the
 of the bankrupt being kept in close custody.

Appell, contra. The commissioners were autho-
 to bring up the bankrupt at the second meeting.
 word "last" may be rejected, if necessary; and it
 is clearly, from the entire clause, considered with
 force to the 5 G. 2. c. 30., to have been the intention
 of the legislature that the bankrupt charged in execution
 be brought before the commissioners at any time
 for the purpose of examination. By the 5 G. 2. c. 30. s. 1.
 the bankrupt is required to submit himself to be examined
 from time to time by the commissioners, and, upon such
 examination, fully and truly to disclose all his effects
 and estates. The term "examination," therefore, means
 examination from time to time. Then, by s. 2., the
 commissioners are, within the forty-two days, to appoint
 several meetings for the purposes *aforesaid*, the last
 on the forty-second day. Then, by s. 6., in case a
 bankrupt is in execution, the commissioners are to at-
 tend him from time to time, and take his discovery as in
 the cases, and the assignees are required to appoint
 him to attend the bankrupt from time to time, and
 to produce his books, in order to prepare his last dis-
 covery and examination. The words "last examin-
 ation" occur here for the first time, and evidently mean
 the last thing as discovery. He was then stopped by
 the court.

JOHN C. J. The question in this case depends en-
 tirely on the construction of the 49 G. 3. c. 121. s. 13.

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That section recites, that great inconvenience arisen from the necessity which then attended the attendance of commissioners of bankrupts to take the examination of bankrupts in custody; and then it enacts, "That every bankrupt in custody at the time of his last examination charged in execution, shall be brought before the commissioners, to be examined by them, in the manner as is now practised with respect to bankrupts on mesne process." - Now, this is a remedy which ought to be so construed as to extend to the mischief intended to be remedied. If the words *last examination* to mean only the time of examination, a great proportion of the recited in the statute would not be remedied. It is obvious that the examination of the bankrupt frequently continues for several days, and it is possible, in many instances, for the commissioners to know before-hand what may be the result of the examination. Supposing the bankrupt not to be in custody, it is clear the commissioners might examine him before them as often as they thought necessary for the purposes of examination, and there can be no reason why they should not do so where the bankrupt is in custody in execution. By the 5 G. 2. c. 20. it is enacted, "That in case the bankrupt is in custody, the commissioners are to attend him in prison, to make discovery as in other cases, and the assizes are empowered to appoint persons to attend the bankrupt being in custody as aforesaid, and to prepare books, in order to prepare his last discovery, a copy of which the bankrupt is to sign, and assignees ten days at least before such last examination." It is quite clear that in this statute the words

ing coupled with the word *discovery*, means that discovery and examination which may become final by a final and satisfactory discovery and disclosure of his estate. The words *last examination* seem to have been introduced from this statute into the 49 G. 3. c. 121. s. 13., and these provisions being in *pari materiâ*, ought to receive a similar construction. I am, therefore, of opinion, that the words *last examination* mean that examination made from time to time, which is ultimately to be the final discovery of the bankrupt's estate and effects. That being so, the commissioners in this case were authorised to have the bankrupt brought before them on the occasion in question; and, consequently, there was no escape, and the judgment must be for the defendant.

BAYLEY J. By the provisions of the 5 G. 2. c. 30. the commissioners were bound to appoint three several meetings for the appearance of the bankrupt, the last of which was to be on the forty-second day after his surrender, and if the bankrupt was in execution, the commissioners were bound to attend him in prison three different times. If he was not in execution, the commissioners might send for him, and he was bound to attend them. Under these circumstances the 49 G. 3. c. 121. s. 13. was passed, the object of which appears, from the recital, to have been to remedy the inconvenience which arose from the commissioners being obliged to attend the bankrupt in prison. Now this inconvenience will not be remedied, if the commissioners are authorised only to bring the bankrupt before them once, viz. on the last day appointed for his examination, and are bound to attend him in prison on the first and second day; and a remedial act should be construed so

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 SPENCE
against
JONES.

1844.

~~Bankrupt~~
~~act~~
~~1844~~

As to remedy the whole mischief, which was their attendance in prison at all statute passed, bankrupts in custody or might have been brought up before the upon any of the days appointed for the and the object of the statute was to give the commissioners the same power over bankrupt execution. The words "last examination" in the bankrupt act are technical, and mean the examination taken at different times, and together a full disclosure of the bankrupt's effects.

HOLROYD J. I have entertained some doubts on this question, but I am now satisfied, that the examination do not mean only the last examination, which the bankrupt is examined by the commissioners, but the final disclosure of his estate and the object of the legislature is to be collected from the 6th section of the 49 G. 3. c. 121. and that was to give to the commissioners the power of bringing before them bankrupts charged with debts as they had previously with respect to bankruptcy on mesne process. The 5 G. 2. c. 30. imposes a penal upon the bankrupt if he omits to submit to be examined 42 days after notice, and submit to be examined from time to time by the commissioners, and at the examination, that is, on his examination from time to time, he is bound fully to disclose all his estate, &c.; and by section 2., the commissioners are appointed, within the 42 days, three severally to examine the bankrupt for the purposes aforesaid, and the last to be

the bankrupt is to attend the commissioners, and be free from arrest during the 42 days, provided that he is not in custody at the time of his surrender. Now, the commissioners receive a complete disclosure of his affairs at the first or second meeting, the bankrupt will be compellable to make any further disclosure, and, consequently, the last examination may be completed at the first or second meeting. It follows, therefore, that the last examination may be taken on either of those days. Considering then the 49 G. 3. c. 121. s. 13., with reference to the provisions of the 5 G. 2. c. 30. s. 6., I think we are warranted in construing the words "last examination" to mean the complete disclosure and discovery of the assets and effects of the bankrupt made from time to time: and whatever separate attendances are necessary for the purpose of making a full disclosure, constitute together the last examination.

JEST J. I think, also, that the words *last examination* do not mean the examination which may take place on the last day of meeting, but the full and final disclosure of the bankrupt's estate and effects upon any of the days appointed for that purpose, and that the commissioners may bring him before them at any time appointed for that purpose.

Judgment for the defendant.

1822.

SPENCE
against
JONES.

1822.

Friday,
May 10th.

AMORY against BRODRICK

obligor A. covenanted that he would, from time to time, at the request of B., avow and confirm all actions that B. should bring in respect of a bond, of which A. was the obligor, without releasing the same.

obligor Declaration stated, that B. commenced an action in the name of A., against the obligee of the bond, and that A. did not, although often requested so to do, avow and justify the said action, but, on the contrary thereof, executed a release to the obligee of all actions, bonds, &c., by reason whereof the plaintiff was hindered from recovering the principal and interest, his costs, and other expenses:

obligor Upon special demurrer to this breach, it was held, first, that the averment of request

was unnecessary, and that it therefore required no venue, inasmuch as defendant had, by executing the release, disabled himself from bringing the bond. Secondly, that it was no ground of demurrer to the whole plaintiff was not entitled to recover the special damage.

COVENANT upon a deed made between ant Brodrick, one Rawlins, and the plaintiff after reciting that Joshua Rowe, by bond of the 10th of December, 1814, became bound to the defendant in 8000*l.*, conditioned for payment of 4000*l.* if the bond had become forfeited by non-payment, that Rawlins had contracted with Brodrick the plaintiff, for the purchase of the bond, and the interest due thereon, for 1700*l.*; and that the defendant was indebted to Amory, the plaintiff, in 1700*l.* advanced and paid; and that Rawlins had assigned the bond absolutely to Amory; it was held, that in pursuance of the agreement, and considerations therein mentioned, he, Brodrick, requested, and by the direction and appointment of Amory, assigned to Amory the bond and all monies to become due thereon. Covenant by the defendant that he would not accept, take, or receive any principal monies and interest thereby payable, he bargained and sold, or make void the same, or any power or authority thereby given, in pursuance thereof to be given; and that the defendant, from time to time, at the request of the plaintiff, should ratify, and confirm all such actions, &c. it was held, that the defendant should lawfully make, take, bring, &c. in respect of the said premises without being nonsuited, or

ing the same, except with the special consent of the plaintiff. The plaintiff averred, that after the making of the indenture, he, on 12th *May*, 1821, commenced an action in the name of *Brodrick* against *Rowe*, upon a bond, to recover the principal and interest; yet, that the defendant, not regarding his covenant, did not, nor would, (although he was afterwards, to wit, on the day of the year last aforesaid, requested by the plaintiff so to do) avow, justify, and maintain, ratify or confirm the action so commenced; but, on the contrary thereof, after the making of the said indenture, to wit, on the day of *March*, 1821, &c. at, &c. the defendant did execute to *Rowe* a general release of all actions, bills, bonds, &c. By reason whereof, the plaintiff was hindered from recovering the principal money and interest due payable by the bond, and in proceeding in the action so commenced by him, and had also been deprived of the means of recovering the costs incurred in the action, and had sustained costs in endeavouring to move the rule of Court to set aside the release. Demurrer to the breach of the declaration, and the causes assigned were; first, that there was no venue to the allegation of breach in the declaration; and, secondly, that, by that breach, the plaintiff sought to recover damages which he was not entitled by law to recover.

Gaselee, in support of the demurrer. By this deed, the defendant covenants, at the request of the plaintiff, to avow, justify, and maintain all actions brought by him. *Lowe v. Kirby* (a), *Pecke v. Mithwolde* (b), *Banks v. Thwaites* (c), and *Back v. Owen* (d), are authorities

1822.

AMORY
against
BRODRICK.

(a) *Sir W. Jones*, 56.(b) *Ibid.* 85.(c) 3 *Leon.* 73.(d) 5 *T. R.* 409.

1892:

Abbott
against
Babbaker.

to shew, that a special allegation of necessity; and if it be a substantial allegation to have had a venue. [*Bayley J.*, the substance begins by the words, "but on the contrary *Harris v. Mantle (a)*, the breach assigned the defendant had not used the premises in a husbandlike manner, but, on the contrary the defendant committed waste. The defendant pleaded, that he had not committed any waste, but used the premises in a husbandlike manner; and it was held that the plaintiff was not at liberty to shew that the defendant had not managed the farm in a husbandlike manner. The plea there was, that he had not committed waste, and upon that issue, he could only shew that he had managed the farm in a husbandlike manner. [*Bayley J.* The plea applied to both parties, and then the question was, what was the substance of the breach.] Secondly, the breach is assigned, that the defendant committed waste, and the costs of the action and the application for the release are alleged as grounds of special plea, and non constat, that he would have committed waste in the action, and *Sutton v. Johnson (b)*, the plaintiff is at liberty to shew, that that would be good ground for an arrest of judgment.

Chitty, contra, was stopped by the Court.

ABBOTT C. J. I am of opinion, that the plea of demurrer assigned is not sufficient. A defendant is bound to allege the request, where the request is to oblige another person to do something. Here the defendant, by executing the release,

(a) 5 T. R. 307.

(b) 1 T. R.

pled himself from supporting any action what-
 , and that is the substantial part of the breach, and a
 est is wholly unnecessary. As to the second cause of
 urrer, it is sufficient to say, that it is no good
 and of demurrer to the whole breach, that the con-
 ential damages are not recoverable. The plaintiff
 stituted to recover some damage, and that is sufficient
 support the breach.

1822.

AMORY
 against
 BRADBICK.

BAYLEY J. The case of *Duffield v. Scott* (a) is an
 authority to shew that the last ground of demurrer
 not be supported. That was an action of debt on
 and conditioned for the performance of covenants:
 on over of the bond and of the deed there appeared
 be a covenant by the testator to indemnify the plai-
 against all debts which his wife should, during sepa-
 on, contract, and against the payment of alimony,
 all costs which the plaintiff should be put to by his
 e's contracts, debts, &c. The breach assigned in the
 lication, was, that A. B. had brought an action
 inst the plaintiff for a debt which his wife had con-
 cted during separation, and had recovered judgment
 the debt and costs, and that the plaintiff was obliged
 pay the same, and to incur expences in the defence
 the suit; yet that the defendant did not indemnify
 plaintiff for the costs so paid by him, or for his ex-
 ses. Upon demurrer it was argued, that the repli-
 ion could not be supported, because the plaintiff had
 igned a breach for the non-payment of a gross sum,
 rt of which the defendant was not bound to pay;
 cause, in order to entitle plaintiff to recover the costs

(a) 3 T. R. 374.

and

1822.

AMORY
against
BRODRICK.

and expenses, he should have shewn that notice of it to the defendant; but it was demurrer could not be supported, for was, at all events, answerable for the debt. No objection to the action that the plaintiff recover more than they were actually entitled to, in covenant, if some of the breaches and the others not, it is no ground for setting aside the whole declaration, but the plaintiff's judgment for the breaches well assigned. On the other point, it is clear, that the defendant's request was unnecessary in this case, as the defendant had, by executing the bond, wholly disabled himself from bringing an action on the bond.

HOLROYD J. Where a party covenants to do a thing, a breach is well assigned, by shewing that he has done it. The effect of the breach assigned is, that the defendant has done a particular thing, and he has wholly disabled himself from avowing that he has not done it. An allegation of request, therefore, was wholly unnecessary. On the other question, the formal words of the declaration shew, that the objection cannot be sustained. The matters assigned, are, that the *said* breach, and the matters assigned, are not sufficient in law. Now the objection is not that the whole breach is insufficient, but that part of it is bad. If, however, there be a breach in the covenant assigned, in respect of which the plaintiff is entitled to recover, a further allegation, that he has thereby sustained special damage, which

(a) *Pinkney v. Inhabitants de Ryeol, 2 Saund.*

entitled to recover, will not prevent him from maintaining his action. If this objection be a ground of defence in itself, it should, at all events, have been confined to that part of the breach only.

BEST J. concurred.

Judgment for plaintiff.

SMITH *against* PRITCHARD.

Friday,
May 10th.

MARTER had obtained a rule nisi for setting aside a warrant of attorney, and the judgment entered upon it, given to secure an annuity, on the ground that the description or place of abode of the witness to the warrant of attorney was not correctly stated in the memorial. It appeared from the affidavits that it was thus stated in the memorial: "*Charles Rilot, clerk to William Ager, of Great Marlborough-street, in the county of Middlesex, gentleman.*" *Charles Rilot* did not reside in *Great Marlborough-street*; but was a clerk to *Mr. Ager*, who resided there; and it was sworn that he had been well known to the defendant for thirteen years. In support of the rule *Darwin v. Lincoln* (a) was cited.

Denman shewed cause. In *Darwin v. Lincoln* the subscribing witness was merely described as clerk of *Mr. Birkett*, and *Mr. Birkett's* residence was not added. It is contended that there is a distinction between the two cases; for, in the present case, he is described as clerk to *Mr. Ager, of Great*

Under the 53 G. 3. c. 141. s. 2. it is requisite that the memorial of an annuity should contain the names and places of abode of the witnesses to a warrant of attorney, given as a collateral security; and, therefore, where it was thus stated, *A. B., clerk to J. S. of D. Street, in the county of M., gent.* Held, that this was not sufficient, it appearing that *A. B.* did not reside, but only attended at the office there at the time.

(a) *Ante*, 444.

Marlborough-

1822.

AMORY
against
BRODRICK.

1822.

 SMITH
 against
 PRITCHARD,

Marlborough-street, and the place where he may be found does appear in the memorial. The 53 G. 3. c. 141. §. 2, only requires that the names of the parties and witnesses should be stated in the memorial, and nothing is said of their places of abode. It is true, the schedule, under the head of names of witnesses, states, "*E. F. of.*" But, by the act, that schedule is to be varied according as the circumstances of the particular case may reasonably require. And there may be cases in which a witness has no place of residence. As, for instance, if he be a soldier or sailor. The word "*of.*" may mean, therefore, that in such an event he should be described as *E. F. of* such a regiment, or of such a ship. The meaning of it is only, that a description of the witness is to be given, in order that he may be ascertained and identified. Here he is so. The description in this memorial would be sufficient in the case of an affidavit made by him. It must, surely, be more satisfactory to describe him in this manner than to have stated some obscure lodging, where his temporary residence may have been when the deed was executed. As to the merits of the case, it is clear that the defendant could not have been put to any inconvenience by it; for it is sworn that he had been thirteen years acquainted with the witness.

Marryat and *Carter*, contra. In *Darwin v. Lincoln* the witness was described as clerk to Mr. *Birkett*, who, in the deed, was described as of *Cloak-lane*; so that there his residence did appear. Here, the attorney might, if applied to, refuse to give information as to the witness. They were then stopped by the Court.

ABBOTT

ABBOTT C. J. I still retain the opinion which I delivered in *Darwin v. Lincoln*, that, taking the second clause of the 53 G. 3. c. 141. and the schedule together, they require, not merely that the name, but the place of abode of the witness should be stated in the memorial. For the second clause requires that the names of the witnesses shall be inserted in the form or to the effect following, and, in the form given by the schedule, after the name of the witness, the word "of" is inserted. Now, that must mean, as it seems to me, that his place of residence should be added. The case of a soldier or a sailor, who may have no place of residence at the time, has been mentioned. Possibly those cases may be provided for by the subsequent words of the clause, giving a power of making such alterations in the schedule as the nature and circumstances of the particular case may reasonably require; and if, therefore, the witness has really no place of residence, the memorial may be sufficient, if it contain a description of him like that suggested in argument. But that is not suggested in the present case. There may be very good reasons why the legislature should require the residence of the party to be stated: for, by applying there, information may be obtained from persons perfectly disinterested, which may not always be the case where application is made at the attorney's office, where the deeds have been executed.

Rule absolute.

1822.

SMITH
against
PARRCHARD.

1822.

Saturday,
May 11th.The KING against The Inhabitants of WHITE-
HAVEN.

Where the un-
emancipated
daughter of an
Irishman, not
having acquired
any settlement
of his own in
England, be-
came pregnant,
being unmar-
ried, and as
such was actu-
ally chargeable
under 55 G. 3.
c. 101. s. 6. :
Held, that this
did not make
her father and
the rest of his
family remov-
able by a pass
to *Ireland* un-
der 59 G. 3. c. 12.
s. 55. ; but
that the daugh-
ter might be
removed by an
order to the
place of her
birth in *Eng-
land*.

UPON an appeal by the inhabitants of the township of *Workington*, in the county of *Cumberland*, against an order of removal of *Mary M'Cormick*, from the town-ship of *Whitehaven*, in the said county, to the township of *Workington*; the sessions quashed the order, subject to the opinion of this Court, upon the following case. The pauper, *Mary M'Cormick*, an unmarried woman with child, and thereby chargeable, but who had not applied for or received parochial relief, was removed from *Whitehaven* to *Workington*, as the place of her birth settlement. The pauper, at the time of her removal, was above the age of twenty-one, had gained no settle-ment for herself, was unemancipated, and living with her father and mother, as part of their family. The father and mother were both *Irish*, and had gained no settlement in *England*. The father had not applied for or received any relief from the removing township, for himself or any part of his family. The father was not examined by the removing magistrates. The question for the opinion of the Court was, whether, under the provisions of the 59 Geo. 3. c. 12., and the above circumstances, the pauper was properly removed to the place of her birth settlement.

F. Pollock and *Armstrong*, in support of the order of sessions. Here the removal was improper; for the whole family should have been removed by a pass to *Ireland*,

Ireland, under 59 Geo. 3. c. 12. s. 33. That act provides, that if an *Irishman*, not having gained a settlement in any part of *England*, shall become chargeable to any parish, by himself or his family, they shall be passed, under the provisions of that act, to *Ireland*. Now here the pauper did become chargeable by his family: for his daughter being an unmarried woman, and pregnant, was, according to the 35 Geo. 3. c. 101. s. 6. actually chargeable to the parish where she was residing.

1822.

—
The KING
against
The Inhabit-
ants of
WHITEHAVEN.

Per Curiam. We are of opinion that the chargeability contemplated by the legislature in 59 Geo. 3. c. 12. s. 33. was the actual asking for parish relief, and not the constructive chargeability created by 35 Geo. 3. c. 101. s. 6. The order of sessions is wrong, and must be quashed.

Order of sessions quashed.

Sawlett and *Courtenay* were to have argued on the other side.

1822.

**Doce on the several Demises of DARVEA, VINES,
and Another against BOWLING.**

Where a testator, after devising his estates to his wife for life, bequeathed certain specific real property (which he described particularly) to each of his three daughters in fee, and then bequeathed the surplus remaining book debts, ready money, monies in the funds, upon bond, and otherwise whatsoever, share and share alike, to be divided amongst his three daughters, to be paid them severally at twenty-two, their equal shares, and the interest in the meantime; and in case either of them died before twenty-two, or single, or before marriage, that the deceased's portion should be equally divided between the two survivors, share and share alike, or their heirs; and in case two died without heirs, that the whole should devolve to the survivor and her heirs, "in case no husband was living. If so, they enjoy the property during life only, and afterwards, her or their fortune goes to the heir or heirs of the survivor or survivors at law;" and that in case all his three daughters die without heirs, and leave no husband living, or at the decease of the said husband or husbands, certain legacies should be paid "out of the before-mentioned estates;" and that all the residue of the estates should be sold, and equally divided share and share alike, amongst his (the testator's) brothers and sister: Held, that this latter devise extended both to the real and personal estate, and that the husbands of each of the daughters, by necessary implication, took an estate for life in the real property bequeathed to their respective wives,

EJECTMENT for certain premises, at *Croydon*, in *Surrey*. The case was tried at the spring assizes for that county, in 1821, and a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case: *James Harris*, now deceased, being seised in fee of the premises, on the 25th December, 1796, duly made his will, whereby he directed his executors to sell his business and stock in trade for the best price that could be got for them, and to allow his wife, *Sarah*, during her life, the use of such part of his household furniture, &c. as she might choose; and, after her decease, to divide such household furniture, &c. equally amongst his three daughters, *Elizabeth*, *Ann*, and *Sarah*. And he then devised to his wife, for life, all his freehold estates, houses, lands, and buildings whatsoever; and, at her decease, he bequeathed certain specific real property to each of his three daughters, in fee. Each devise described very particularly the lands, &c. given to each daughter. And he then bequeathed as follows: And also, after my decease, and all my just debts are fully paid, and my business and stock in trade

equally divided between the two survivors, share and share alike, or their heirs; and in case two died without heirs, that the whole should devolve to the survivor and her heirs, "in case no husband was living. If so, they enjoy the property during life only, and afterwards, her or their fortune goes to the heir or heirs of the survivor or survivors at law;" and that in case all his three daughters die without heirs, and leave no husband living, or at the decease of the said husband or husbands, certain legacies should be paid "out of the before-mentioned estates;" and that all the residue of the estates should be sold, and equally divided share and share alike, amongst his (the testator's) brothers and sister: Held, that this latter devise extended both to the real and personal estate, and that the husbands of each of the daughters, by necessary implication, took an estate for life in the real property bequeathed to their respective wives,

disposed

disposed of, the surplus remaining, and book-debts, with all my ready money and monies in the public funds, and monies upon bonds, and mortgage, and otherwise, whomsoever, wheresoever, and whatsoever, I give equally, share and share alike, to be divided amongst my three daughters, *Elizabeth, Ann, and Sarah*, to be paid them severally when they arrive to the age of twenty-two years, their equal share, and not before; and desire my executors, &c. may place the said sum, be what it will, out to interest, either in the public funds or for other real security, and apply the interest to their support, in order for the said interest to find them food and clothes, and pay for their education, or what is judged needful by their trust, so that they may not be obliged to live upon any part of their mother's small income; and in case either of my three daughters, *Elizabeth, Ann, or Sarah*, shall die before they arrive to the age of twenty-two years, or die single, or before marriage, the said deceased's portion shall be equally divided between the two surviving sisters, share and share alike, or their heirs; also, in case two of my daughters die without heirs, then the whole devolves to the surviving one, and her heirs, in case no husband is living; if so, they enjoy the property during life only, and afterwards her or their fortune goes to the heir or heirs of their sister, as heirs at law. I also make this reserve, in case all my three daughters shall die without heirs, and leave no husband living, or at the decease of the said husband or husbands, should it happen such then exist at their decease, I give, out of the before-mentioned estates, &c. [he then specified certain pecuniary legacies.] And if this should so happen, when those legacies are so paid, I leave and

1822.

Debt due
Dated
against
Bowling

1822:
 ———
 Dor. dem.
 DRIVER
 against
 BOWLING.

give all residue of my estates that remains, to be sold, and equally divided, share and share alike amongst my three brothers *George*, *Edward*, and *Joseph Harris*, and sister *Sarah Barnett*, or their heirs. On the 22d *January*, 1799, the testator died, leaving *Sarah*, his wife, and *Elizabeth*, *Ann*, and *Sarah*, his daughters and only children, surviving. In the month of *September*, 1802, *Elizabeth* died, unmarried and under the age of twenty-two years. On the 20th *June*, 1807, *Ann* married the defendant, and, after attaining her age of twenty-two years, died in *May*, 1808, without issue. On the 29th *August*, 1809, *Sarah* married *A. P. Driver*, one of the lessors of the plaintiff; and, afterwards, on the 26th day of *April*, 1819, died, leaving issue. In *September*, 1820, the testator's widow died. The present ejectment was brought to recover possession of a moiety of a house originally contained in the specific devise in fee to *Elizabeth*, which moiety was claimed by the defendant as devisee under the above-recited clause. The question for the consideration of the Court was, whether, under the above clause, the defendant was or was not, on the 1st day of *January*, 1821, entitled as such devisee. It was admitted, on a question put by *Abbott C. J.*, that, on the death of all the three daughters, without issue, the heir at law of the survivor would be one of their three uncles, mentioned in the residuary clause of the will.

Platt, for the lessors of the plaintiff, contended that the latter part of the will was confined to the testator's personal estate only, and therefore, that the defendant did not, as husband of *Ann*, take an estate for life in the moiety of the house, which, on the death of *Eliza-*
beth,

bet, descended on her and Mrs. Driver, as surviving coheirresses. The testator first disposes of all his real property in fee to his three daughters, and then altogether of his personal estate. The daughters are to take equal shares, and the interest of their shares is to be applied to their support. And then, in case one of them dies under 22, her portion is to be equally divided; and if two die without heirs, then the whole devolved on the survivor. All this applies to the personal property, for the words share and portion are synonymous, and the former clearly is confined to the personal estate. If so, the devise by implication to the husband for life cannot apply to the real estate, and then the defendant has no title.

1822.

DOX dem.
DRIVER
against
BOWLING.

Chitty, contra. The devise applies to the whole, both real and personal. The word portion obviously refers to the previous division made by the testator of specific portions of his real property to his three daughters. And the words following them, relied on by the other side, are strong to this effect. For the testator, after saying, that the whole devolves to the surviving daughter in case no husband be living, adds, "if so they enjoy the property during life only, and afterwards her or their fortune goes to the heir of the surviving sister as heirs at law." These words property and fortune, apply to the whole given by the will, and the devise over is to the heirs of the sister as heirs at law, which can only be in case of real property. Then the devise over to the uncles is also strong; for he gives legacies "out of the before mentioned estates," which is strong to shew real property was intended, and ultimately after these legacies are paid, devotes all the residue of his estates to be

1852.

Doct. decd.
Dartee
against
Bowling.

sold and equally divided. Now what was to be sold? That expression applies to real property peculiarly. Then taking the whole will together, it is clear the testator meant to include in this part of it, real property. If so, the moiety of Elizabeth's real estate comes under the will to her, and the defendant being entitled under the will to a life estate in that property, is entitled to the judgment of the Court.

Abbott C. J. There is considerable obscurity and confusion in this will; but, upon the whole, I am of opinion, that the residuary clause and the gift over apply both to the real and personal property of the testator, and are not confined to the latter. The primary intention of the testator seems to have been, that all his property should be divided equally amongst his three daughters, and that their respective issue, if they had any, should inherit their mother's share. He does not leave them the whole property as tenants in common, but assigns certain specific portions of it to each daughter, and then leaves the residue "equally, share and share alike to them, to be paid at 22, their equal share." Then comes the provision, that in case of the death of any one of them before she arrived at 22, or in case she died single, her portion should be divided equally between the two survivors, share and share alike, or their heirs. Now, it seems to me manifest, that the word portion in this part of the will is not confined to the personal estate of the testator, but applies to his real property also. The will then proceeds to state, that in case two of his daughters die without heirs, the whole should devolve "to the survivor and her heirs in case no husband is living, if so, they enjoy the property

property during life only, and afterwards her or their fortune go to the heirs of their sister as heirs at law? And in case all three die without issue "and leave no husband living, or at the decease of such husband, should it happen, such then exist at their decease," he gives certain legacies out of "the before mentioned estates," and all the residue of the estates to be sold and equally divided among his three brothers, share and share alike. Now it seems to me, that the word estates is large enough to comprehend, and is most properly applicable to real property, and the direction that the estates shall be sold confirms that opinion. The provision in the will respecting the husband, is not an unusual provision. Although, therefore, there are no express words giving an estate for life to the husband, yet, as it appears from the will, that the heir at law is not to take till after his death, it seems that the husband by necessary implication takes an estate for life. The defendant is therefore entitled to our judgment.

Bayley J. If an estate be given to the heir at law expressly after the death of A, A takes an estate for life by implication. Now that is clearly the case here, unless the latter part of the will be confined to the personal property alone: and taking the whole will together, it seems to me, that it is not so confined, but that it extends to the real property also.

Holroyd and Best J. concurred.

Judgment for defendant.

1822.

Don dem.
Driver
against
Bowling.

1822.

and edit
March 26
1822

Defendant being taken up on the 8th of June, upon an indictment for a libel, entered into a recognizance to appear and plead, within the first eight days of Trinity term, and to try the cause at the sittings after that term. The defendant pleaded not guilty, but did not give notices of trial or make up the record, either for the sittings after Trinity or Michaelmas term, nor were the recognizances respited. The prosecutors gave notice of trial after Trinity and Michaelmas term, but the causes were not tried. The defendant was ready and willing to take his trial on both these occasions. The recognizances were estreated in Hilary term, without any notice to the defendant, or any motion by the prosecutor: Held, that this estreat was regular.

The King against CLARK.

SAME against SAME.

BINGHAM moved for a rule, calling upon the officer of the crown-office, who had estreated the defendant's recognizances in these cases, to show cause why the estreat should not be set aside for irregularity, and why he should not pay the cost occasioned thereby. It appeared that the defendant was taken up under a Judge's warrant, issued against him upon an indictment found by the grand jury in this court in Easter term last, for publishing a blasphemous libel, and that he, on the 8th June last, entered into the usual recognizance, himself in 80*l.* and two sureties in 40*l.* each, to appear and plead within the first eight days of the then next Trinity term, and to try the cause, at the *Middlesex* sittings after that term, and personally to appear upon the return of the postea, if convicted, and, in the meantime to be of good behaviour. To this indictment he pleaded not guilty, on the 23d June. On the 29th June, another indictment having been found against him by the grand jury in this court for a subsequent publication of the same libel, he pleaded not guilty thereto; and, on the 30th June, entered into a second recognizance, himself in 80*l.* with one surety in 80*l.* for peremptory proceeding to the trial of that indictment, at the *Middlesex* sittings after Trinity term, and, in the meantime, for being of good behaviour. The defendant did not give notices of trial, or make up the records in either of these prosecutions, either after Trinity or Michaelmas term, nor did he obtain any rules for respiting the estreating of the recognizances. The prosecutors, however,

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gave notices of trial after *Trinity* term; but there being no sittings at *Westminster*, the causes were not tried. In *Michaelmas* term they gave notice again, and made up the records for trial. The causes, after having been appointed for trial, were, in consequence of the pressure of business, made remanets to the sittings after *Trinity* term, upon the prosecutors' records. In *Trinity* term the recognizances were estreated, (without any notice to the defendant, or any motion for that purpose made by the prosecutors,) in consequence of the defendant's default, in not giving notice and making up the records, either in *Trinity* or *Michaelmas* terms last. It was contended, on the part of the defendant, that the estreat was irregular, inasmuch as the records having been actually taken down for trial by the prosecutors, no default had been made by the defendant, who was ready and willing to be tried there. And, besides, in this case, the defendant had no notice of his default.

Per Curiam. It was the defendant's duty, in pursu-
sance of his recognizances, to be prepared, according
to the practice of the Court, to try at the sittings after
Trinity or Michaelmas terms, and he was not so pre-
pared; nor he neither gave notice to the prosecutors,
nor made up the records, on either occasion. And the
prosecutors having done so is immaterial to the question.
There was no necessity to give any notice to him that
his recognizances would be entered; for he was bound
to take notice of the terms of his own recognizance.
The rule must, therefore, be refused, the present being
quite regular, and conformable to the ordinary practice
of the Court.

Rule 4 refused.

1869.

**The King
against
CLARK.**

1822.

Ex parte GRIFFITH GRIFFITHS.

The Court will grant a habeas corpus to the warden of the fleet, to take the body of a debtor confined there, before a magistrate, to be examined, from time to time, respecting a charge of felony or misdemeanour.

GRIFFITH moved for a writ of habeas corpus to be directed to the warden of the fleet, commanding him to carry the body of *Griffith Griffiths* before the lord mayor, or some other justice of the city of London at the Mansion-house there, from day to day to be examined, touching a charge of felony and misdemeanour. It appeared by the affidavit of the sole owner of the ship, *Samuel of Liverpool*, that *Griffiths* was the master of that ship, which was in February 1821, chartered on a voyage from *Liverpool* to the *Brazils*, and back, and that *Griffiths* having had the certificate of registry duly delivered to him as master, had deviated and otherwise misconducted himself during the voyage; and on the 27th of April last, arrived with the ship in the port of London. Upon this he was personally required by the owner to deliver up either to him, or at the custom-house to the proper officer there, the certificate of registry. But he refused altogether so to do: whereupon the owner had applied to, and obtained a warrant against him from the lord mayor, for the purpose of proceeding to convict him of the offence pursuant to the statute 34 G. 3. c. 88. s. 18. and thereby enabling himself to obtain a registry de novo of the ship if necessary. *Griffiths* being, however, at this time, a prisoner in the Fleet for debt, there was no power of taking him under the warrant unless the Court granted this writ. And he referred to *Re v. Woodham*. (a)

The Court thought it a proper case for their interference, and thereupon directed the writ to issue.

Writ granted.

1822.

The King against EDMUND GRIFFITHS, Esq.

MANDAMUS directed to the mayor, aldermen, and common council of the city of *Bristol*, to restore the defendant to the office of steward of the Tolzey Court of that city. The corporation returned in substance as follows: That the mayor, burgesses and commonalty of the city of *Bristol* were a corporation by prescription. And that the Court of the Tolzey in the said city was an ancient court of record, holden in the *Guildhall* of the said city, before the sheriffs, according to the law of merchants, and according to the immemorial usage and custom of the said city, and according to the liberties granted by charter, having cognizance of pleas to an unlimited amount, and having also privilege of proceeding by foreign attachment; and that the office of steward of the said court, was an office of great trust, touching the administration of justice therein; and that it was the duty of the steward to attend the court whenever the same was holden, and more particularly courts appointed for trials of causes at issue. It then set out a charter of *Charles* the Second, incorporating the common council, and giving a power of making bye laws, and providing, that in case of death, amotion, &c. the steward should be elected by the mayor and common council. On the 10th September, 1795, Mr. *Griffiths* was elected by the common council, and took the oath of office. In 1814, whilst the defendant was steward, it appearing to be expedient that courts should be holden more frequently than they had usually been, it was determined

Whereas a return to a mandamus to restore a party to a corporate office is defective in form, but, on the whole, it appears that there is good ground for amotion, the Court will not award a peremptory mandamus; the only effect of which would be to compel the corporation to restore an officer whom they would be bound immediately to remove in a more formal manner.

by

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by the Court that they, in future, should be holden every week, except during the time of holding the Pie Poudre Court; and that courts for rules and courts for trials should be held on each alternate *Monday*, of which determination the defendant gave public notice. For upwards of three years after such determination, and during the time the defendant continued to reside at *Bristol*, the court was generally holden every week, except during the time of holding the Pie Poudre Court, and during all that time the defendant usually attended the courts, as well when they were held for rules as for trials. In *April*, 1818, he was appointed a police magistrate in *London*, and from thence continually ceased to reside at *Bristol*, or within 100 miles thereof, the office of police magistrate being one of great trust, and requiring almost constant attendance in *London*, and from that time he ceased to attend the courts regularly. There were held between *April* 1818, and *January* 1821, seventy courts for rules, of which the defendant had attended few, if any; and only thirteen courts for trials could be held during that time. On the 9th of *June* 1819, on complaint being made to the mayor and common council, he was requested to attend every court. On the 15th *September* 1819, the sheriff reported that 37 courts had been held from 15th *December* 1818, to *September* 1819; of which the steward had attended only five, and that many questions of difficulty had arisen, and improper responsibility had been thrown on the sheriffs. Upon this there was an order to him to attend every court. The return then stated that many courts had been held afterwards, and that defendant had in particular omitted attending two, viz. 8th and 15th *November*. On the 28th *June* 1819, the sheriffs appointed a court for trials,

of

of which notice was given to the defendant, stating that there were causes at issue, and ready for trial; but he did not attend, in breach of the duty of his office. The same happened on the 29th *November* and 13th *December* 1819, and 24th *April*, 5th *June*, 28th *August*, and 18th *September* 1820, and thereby he delayed the suitors; and by this irregularity and unfrequency of holding the courts, suitors were prevented from bringing actions. On 18th *December* 1820, the sheriffs appointed another court for trials, of which the defendant had notice. On this he wrote a letter, saying, he could not concur, and could not have any court until the 8th *January*, and omitted attending on the 18th *December*. On the 13th *December*, 1820, a meeting of the common council was held, when the sheriff's report was read, which stated, that ten courts had been appointed, at only one of which the defendant had attended; and it was resolved that he should have notice to attend at the then next meeting of the common council, to be held at the court-house on the 6th *January*, to shew cause why he should not be amoved by the mayor and common council from his office of steward of the court, for his repeated absences from the courts, and the injury and inconvenience sustained by the public in consequence thereof. Notice of this was given to him on the 16th *December*. On the 6th *January*, 1821, a meeting of the mayor and common council, at the court-house, was duly held, for the purpose of considering the premises, &c. At this meeting the defendant did not appear or shew cause; whereupon an order was made to amove him, and his office was declared vacant. On the 13th *January* a successor was elected, who took upon himself the office.

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Griffiths,

1822.

The King
against
Garnons.

Griffiths, in person, took several objections to the validity of this return, founded on the irregularity of the mode adopted by the corporation to amove him. But they have not been stated, the Court having expressly declined to pronounce any judgment upon them.

Lawton, contra, after arguing upon these objections, contended, that, even supposing them to be valid, the Court would not grant a peremptory mandamus to restore, because it clearly appeared on the face of the return, that the defendant was liable to be removed. For the acceptance of the office of police-magistrate was inconsistent with his former office, and rendered it quite impossible for him to discharge properly the duties of the steward of this court. He referred to the 32 G. 3. c. 53. s. 2., 42 G. 3. c. 76. s. 3., and 1 & 2 G. 4. c. 116. s. 3. (the police acts), and to the cases *Rex v. Mayor of Newcastle (a)*, *Rex v. Mayor of London (b)*, *Rex v. Mayor of Axbridge (c)*, *Rex v. Tidderley. (d)*

Griffiths, in reply to this point, suggested that, by the 32 G. 3. c. 53. s. 2., only two magistrates are bound to attend at once in the police-office: and by s. 1. there are three appointed. It was, therefore, very possible to arrange business so as to make the two offices quite consistent. In addition to this, any county magistrate may attend and do the duties of the office. As to the objection of incompatibility, it only applies to offices having a connection with each other: as, where they are in the same corporation, or where the duties of

(a) *Bull. N. P.* 206. 1 *Burr.* 580. *S. C.*

(c) 2 *Cowp.* 523.

(b) 2 *T. R.* 177.

(d) 1 *Wm.* 14.

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the one depend on those of the other. Here, the two are wholly unconnected.

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against
Gawronski.

AMERY C. J. It is unnecessary to pronounce any judgment upon the formal objections taken to this return, because I am clearly of opinion, that the Court are not to grant a peremptory mandamus in a case where, if the party was restored, he might be immediately removed again. The case of *Rex v. The Mayor of Newcastle*, cited in 1 *Barr.* 580., is an authority in point. There it appeared by the return, that there was a power to remove Mr. Featherstonhaugh, and the Court refused to interfere; and there are other cases which support the same principle. Now, from the facts stated on the face of this return, and if they are untrue the defendant may bring an action for a false return, it appears that the Tolzey Court of *Bristol* is an immemorial court, and that it is the duty of the steward to attend it whenever it is held. It is then stated, that in 1818, the defendant was appointed to the office of a police magistrate at *Shadwell*, and that from that time he ceased to reside at *Bristol*, or within an hundred miles thereof; his office of police magistrate being one which requires continual attendance in *London*. Now, it seems to me to be impossible to say, that this did not afford abundant cause for filling up the office with some other person. Without, therefore, giving any opinion upon the formal objections taken to this return, I think we ought not to grant a peremptory mandamus; because, by so doing, we shall only unnecessarily harass the parties in this case.

BAYLEY J. It is in the discretion of the Court, according to the cases cited, to grant a peremptory mandamus;

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mandamus; and, although there may be objections to the mode of removal in this case, still, as it appears on the face of the return that there is good ground for the removal, the only effect would be, that, if we were to make an order for restoring the defendant to his office, it would become the duty of the corporation to remove him again, in a more formal manner, for his preceding neglect of duty. Under these circumstances, therefore, I think we shall best exercise the discretion vested in us by refusing to grant a peremptory mandamus.

HOLROYD J. concurred.

BEST J. We are not obliged to do so absurd a thing, as to order a person to be restored to an office, (however irregularly he has been removed from it,) who ought to be removed again the moment that he is restored. The writ of mandamus was not intended to enable a party, by taking advantage of the want of form, to defeat justice. In the cases to which we have been referred, the Court in the exercise of its discretion refused the writs, although the parties against whom they were prayed, had acted irregularly. It appears from the judgment in *Rex v. The Mayor of London* (a), that that refusal was not hastily given, but after much consideration by the Court. The Judges who decided that case, were not referred, in the course of the argument, to *Rex v. Axbridge*, which is an authority in point, or I think they would not have doubted as they appear to have done. The question for us to decide is, whether we shall advance justice by granting or refusing the writ. Mr.

(a) 2 Term Rep. 177.

Griffiths has long ceased to do the duties of the office in the Tolzey Court, and he has now incapacitated himself by accepting a situation which requires his constant attendance, above 100 miles from *Bristol*. It has been urged, that by an arrangement with his brother magistrates, he may always be absent from *London* on *Saturday*, *Sunday* and *Monday*, and therefore, that he could attend in his place at *Bristol* on *Monday*. But the sickness of a magistrate might interrupt this arrangement, or the state of the town might require the attendance of more than the ordinary number of magistrates. Ought any man to take an office, the duties of which are to be performed at a great distance from *London*, on the expectation of the uninterrupted continuance of this arrangement amongst the police magistrates? By restoring *Mr. Griffiths*, instead of advancing justice, which is the object to be maintained by a mandamus, we stop the course of justice at *Bristol*, until he shall be regularly removed, and another person again appointed in his place.

Peremptory mandamus refused.

WEST against FRANCIS.

Wednesday,
May 13th.

DECLARATION stated, that the plaintiff was the proprietor of seven prints therein described, and that he was entitled to the sole right and liberty of printing and reprinting the same; yet, that the defendant published, sold, and disposed of 500 copies of each

The vendor of a print, being a copy in part of another, by varying in some trifling respects from the main design, is liable to an action by the proprietor

of the original; and that although the vendor did not know it to be a copy.

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of the said prints, without the consent of the plaintiff in writing. The second count stated, that the defendant wrongfully sold and disposed of 500 copies of the said prints, being respectively copies in part of such prints, by small variations from the main designs. The third count charged, that a person, whose name to the plaintiff is yet unknown, did copy 500 of the said prints, by varying from the main designs thereof, without the express consent of the plaintiff; and that the defendant sold and disposed of 500 copies of the said prints so unlawfully copied. Plea, not guilty. At the trial before *Abbott C. J.* at the *Middlesex* sittings after last *Trinity* term, it appeared, that the plaintiff was the proprietor of the prints described in the declaration; and that the defendant, who was a print-seller, had sold copies of the same, all varying from the original in some respect, but preserving generally the design of the original. There was no evidence to shew that the defendant knew the prints he sold, to be copied from the plaintiff's prints. It was objected for the defendant, that the action was not maintainable under the 17 *G. 3. c. 57.* for merely selling a varied copy of a print. The Lord Chief Justice reserved the point, and the plaintiff having obtained a verdict, a rule nisi was obtained in last *Michaelmas* term for entering a nonsuit; and now,

Scarlett, Marryat, and Reader shewed cause. The question is, whether the prints sold to the defendant can be considered as copies of the plaintiff's prints, within the meaning of the 17 *G. 3. c. 57.* That statute enacts, "That if any engraver, etcher, print-seller, or other person, shall engrave, etch, or work, or cause, or procure to be engraved, etched or worked in mezzotinto, &c. or in any other manner, copy in the whole or
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in part, *by varying, adding to, or diminishing from the main design, &c.*" Now, it is clear, that an action would lie against the party who copied in part, by varying, adding to, or diminishing from the main design. The statute then goes on, "or shall print or reprint, or import for sale, or cause or procure to be printed, reprinted, or imported for sale, or shall publish, sell, or otherwise dispose of any copy of any print, which shall be engraved, &c. in any part of *Great Britain*, without the express consent of the proprietor thereof in writing, &c. &c.; then every such proprietor, &c. shall by a special action upon the case to be brought against the person so offending, recover such damages as a jury, &c. shall give, together with double costs of suit." The question is, whether that which would clearly be a copy within the former part of the section, is also a copy within the latter branch. The whole clause forms one entire sentence, and a copy with variations is evidently within the latter as well as the former. Indeed, such a copy comes within the popular sense of the word. Suppose a party copied a writing without inserting the capital letters, or that he copied a map and put the names of the places in italics, each of these, strictly speaking, would be a copy, though not a copy in all its parts. So there may be a copy of a print with small variations, although it be not an exact copy. In *Gahagan v. Cooper (a)*, the declaration confined the case to the selling exact copies. Here, the declaration contains a count for selling copies in part by small variations from the main design, and therefore, that point does not arise: and the objection, if it be one, is on the record. The 8 G. 2. c. 18. s. 1. is a statute on the same subject, and enacts, "That every person who

1832.

 Went
against
Fletcher.

(a) 5 Comph. 111.

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shall invent, design, engrave, &c. in mezzotinto or from his own work and invention, shall cause to be designed and engraved, &c. any print, shall have the sole right of printing and reprinting the same for the term of 14 years; and that, if any printseller, or any other person whatsoever, shall engrave, &c. as aforesaid, or in any other manner copy and sell, or cause to be engraved, etched or copied, and sold in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof in writing, signed by him in the presence of one or more credible witnesses, or knowing the same to be so printed or reprinted, without the consent of the proprietor or proprietors, shall publish, sell, or expose to sale, or otherwise, or in any other manner dispose of such print without the consent, then such offender shall forfeit the plate on which such print shall be copied, &c. to the proprietor of such original print, and shall forfeit five shillings for every print found in his custody, either printed or exposed to sale, contrary to the true intent of this act, &c." The copy there contemplated, was clearly one varying from the original and not an exact copy. In that act, it is true, it is necessary, in order to make the seller liable to the penalty, that he should know that print to be a copy, but that qualification is omitted in the 17 G. 3. c. 57., the legislature evidently intending to extend a further protection to the proprietors of such works, and for that purpose making the seller of every copy responsible to the author.

Gurney and Denman, contra. This is a penal act; for the defendant is thereby rendered liable to double costs.

costs. The action is not brought for a penalty under the 8 G. 2. c. 13. but is a special action on the case, given by the 17 G. 3. c. 57. In the former statute, the persons engraving and selling the prints, or causing to be engraved, copied, or sold, in the whole or in part, are guilty of an offence. But the party merely selling is only guilty of an offence when he knows it to have been printed without the consent of the proprietor. Considering the two acts together, it is rather to be inferred that the legislature meant the seller only to be liable to an action where he knew the copy was printed without the consent of the proprietor. The statute meant to distinguish between a fraudulent alterer and a mere seller. Here, the prints sold by the defendant varied from the plaintiff's prints; and, therefore, cannot be considered to be copies. The case of *Gahagan v. Cooper* (a) is expressly in point. It was, in that case, held to be no offence under the 38 G. 3. c. 71., which was made to prevent the pirating of busts and other figures, made and published by statuary, to sell a pirated cast of the bust, if the piracy has any addition to or diminution from the original, and the words of that act of parliament are very similar to the present.

ABBOTT C. J. This act of parliament was intended to preserve to artists the property of their works. The question is, what is the meaning of the word "copy" of a print. Now, in common parlance, there may be a copy of a print where there exist small variations from the original; and the question is, whether the words are

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 WEST
 against
 FRANCE.

(a) 3 Campb. 111.

1829,

 WOOD
 against
 FRANCH.

used in that popular sense in this act of parliament. That is to be collected from looking at the whole clause, by which it is provided, that if any one shall engrave, &c., or in any other manner copy, in the whole or in part, by varying, adding to, or diminishing from, the main design, or shall print or reprint, or import for sale, or publish, sell, or otherwise dispose of any copy of any print, he shall be liable to an action. Now, if the selling of a copy with colourable variations is not within the act of parliament, the printing or importing for sale such copies will not be prohibited. The whole must be taken as one sentence; and the sale of any copy of a print, although there may be some colourable alteration, is within the act of parliament. The case of *Gahagan v. Cooper* proceeded upon a different act of parliament. In this case, I am satisfied, the verdict is right; and, therefore, this rule must be discharged.

BAYLEY J. I am of the same opinion. The provisions of the 8 G. 2. c. 13. are entitled to great weight in the construction of this latter act of parliament. That act imposes, first, a penalty upon any persons who shall engrave, copy, and sell, or cause to be copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design; and, secondly, upon persons selling the same, knowing them to be so printed or reprinted. The act of the 17 G. 3. c. 57. was passed to remedy the same mischief, and the words, "knowing the same to be so reprinted," are omitted. It may, therefore, be fairly inferred, that the legislature meant to make a seller liable, who did not even know that they were copies. The former part of the 17 G. 3. c. 57. s. 1. applies

applies to persons who actually make the copy, and who, therefore, must know that it is a copy. But the latter branch applies to all persons who shall import for sale, or sell any copy of a print. Every person, therefore, who sells a copy which comes so near the original as this, is thereby made liable to an action. There can be no reason why a person should not be liable where he sells a copy with a mere collusive variation; and, I think, we should put a narrow construction on the statute, if we held such a collusive variation from the original not to be a copy. A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original. For these reasons, I think, the plaintiff is entitled to recover; and, consequently, that the rule must be discharged.

HOLROYD J. I am of the same opinion. We should be careful not to give too extensive a construction to this act of parliament, but, at the same time, one sufficient to remedy the mischiefs intended to be guarded against. The question is, what is the meaning of the word "copy." Now, in the preceding part of the clause, the legislature have called that a copy, which is not strictly so in all its parts, being one varying from the main design; and I think that the word must have the same construction in the latter part. *Gahagan v. Cooper* was decided upon another act of parliament, and Lord *Ellenborough's* judgment proceeded upon the particular mode in which the counts of the declaration were framed.

BEST J. concurred.

Rule discharged.

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West
against
Francis.

1822.

11th S.C. 1 Nov & Ry. 409

11th S.C. 1 Nov & Ry. 409

Wednesday,
May 15th.WOOLLEY, Executrix of WOOLLEY, deceased,
against CLARK and Another.

The property of a deceased person vests in his executor from the time of his death; in an administrator from the time of the grant of the letters of administration; and, therefore, where A. took out letters of administration under a will by which he was appointed executor, and after notice of a subsequent will, sold the goods of the testator: Held, that the rightful executor in an action of trover was entitled to recover the full value of the goods sold; and that A. was not entitled, in mitigation of damages, to shew that he had administered the assets to that amount.

TROVER for stock in trade and household goods.

In the first count the goods were laid to be the property of the testator; in the second, of the plaintiff, as executrix. Plea, not guilty. At the trial, before *Abbott C. J.* at the *Middlesex* sittings after last *Michaelmas* term, the following facts appeared in evidence: the testator died on the 16th *June*, 1819; at that time the defendant, *Clark*, had in his possession a will of the testator, bearing date the 29th *April* in that year, by which he was appointed executor. This will was proved on the 23d *June*, 1819, and administration was granted to *Clark*, and he directed the sale of the several articles mentioned in the declaration, which were sold by the other defendant, an auctioneer, on the 30th *July*, 1819. The testator had made another will on the 12th *June*, 1819, by which he appointed the plaintiff his executrix; and it was proved that the defendants had notice of this second will previously to the sale of the goods. The second will was proved on the 21st *May*, 1821, (the probate of the first will, under which the defendants acted, having been revoked upon citation,) and administration was granted to the plaintiff. It was contended, on the part of the defendant, that the revocation of the probate of the first will did not avoid all the mesne acts, but that the defendants might shew due administration of the assets to the amount of the value of the goods. The Lord Chief Justice would not allow the defendants

to give evidence of administration of the assets, and the plaintiff obtained a verdict for the full value of the goods. A rule nisi having been obtained for a new trial,

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against
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Brougham and *Chitty* now shewed cause. The property vests in the executor from the time of the death of the testator; and, consequently, the defendant in this case had no right, as against the rightful executor, to sell these goods. The case of *Allen v. Dundas* (a) is an authority only to shew, that a payment made to an executor, acting under an existing probate, by a party ignorant of its being unfairly obtained, is valid; and *Parker v. Kett* (b) only shews, that the party will be bound by a legal act done by an executor de son tort; but here the act was illegal.

The Solicitor-General and *Wightman*, contra. In *Allen v. Dundas* it was held, that the payment of money to an executor, who had obtained probate of a forged will, was a good discharge to the debtor of the intestate; and in *Puckman's* case (c) it was held, that though letters of administration be countermanded and revoked, a gift or sale made by the administrator acting under the probate was not thereby defeated; and *Semine v. Semine* (d) is an authority to the same effect.

ABBOTT C. J. There is a manifest distinction between the case of an administrator and an executor. An administrator derives his title wholly from the ecclesiastical court. He has none until the letters of administration

(a) 5 T. R. 125.

(b) 1 Ed. Raym. 658.

(c) 6 Co. 19.

(d) 2 Lev. 90.

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1822.

WOOLLEY
against
CLARE.

are granted, and the property of the deceased vests in him only from the time of the grant. An executor, on the other hand, derives his title from the will itself, and the property vests in him from the moment of the testator's death. That being so, the property vested in the plaintiff, as executrix, from the time of the death of the testator; and, consequently, the defendants, who had notice of the second will, had no right to sell, and therefore are liable in this action.

BAYLEY and HOLROYD, Justices, concurred.

BEST J. Where a party obtains a judgment irregularly, which is afterwards set aside for irregularity, he is not justified in acting under it; but the sheriff is justified. Here, the first probate was irregularly obtained. The party who obtained that probate, therefore, was not justified in selling the goods; but a creditor, who paid him a debt while the letters of administration were unrepealed, would be protected.

Rule discharged. (a)

(a) See *Phillips v. Biron*, 1 Str. 503.

Wednesday,
May 15th.

The KING *against* The Sheriff of MIDDLESEX,
in the Case of WOODWARD v. FELTHAM.

Attachment irregular, being obtained after summons to attend before a judge for payment of debt and costs, the

ABRAHAM had obtained, in last term, a rule nisi, for setting aside an attachment against the sheriff, for not bringing in the body, on the ground of irregularity.

larity.

larity. On shewing cause, the matter was referred to the Master, who, on this day, reported that the defendant ought to have justified his bail on *Monday, 4th February*. On *Saturday, 2d February*, the defendant served a summons for payment of debt and costs, returnable on the 4th. The plaintiff's attorney did not attend, and the summons was renewed for the 5th. The bail not having justified on the 4th, the plaintiff, on the 5th, obtained the attachment. The Master was of opinion, that the attachment was irregular, because the plaintiff's attorney, by absenting himself from the first summons, ought not to be allowed to get the advantage of an attachment, which he would not have got if he had attended; as the Judge would probably, in that case, have directed the debt and costs to be paid on the 4th; and if not paid, then the attachment might have issued.

The Court, after hearing *Abraham* in support of the rule, and *D. F. Jones* contra, made the

Rule absolute.

HARVEY *against* COOKE.

Friday,
May 17th.

GURNEY had obtained a rule nisi to discharge the defendant out of custody in this case, on the ground that she was a married woman. The defendant's affidavit stated, that she was a married woman, "as by the certificate annexed will appear," and that her husband,

On an application to discharge a defendant out of custody on the ground that she was a married woman, it is necessary that that fact should

be positively stated in the affidavit. And, therefore, where it was sworn that she was a married woman, as by certificate annexed will appear, it was held insufficient.

James

1822.

The King
against
The Sheriff of
MIDDLESEX.

1822.

HARVEY
against
COOKE.

James Stamp Sutton Cooke, was still alive. She also stated, that she had never represented herself as a single woman. The affidavit also contained circumstances, by which it appeared that the plaintiffs were acquainted with her coverture. The affidavits in answer, positively negatived these facts, and stated, that she had represented herself as a widow, which the plaintiffs believed to be true when the goods were obtained in *April*, 1821. The certificate annexed was of the marriage of *James Cooke to Sophia Saunders*.

Whateley shewed cause, and contended, that where goods had been obtained, as in this case, under a fraudulent misrepresentation of the defendant's situation, the Court would never interfere to relieve her on motion, but would leave her to plead her coverture. Here, too, the affidavit is insufficient; for she does not swear positively that she is a married woman, but only that she is so as by the annexed certificate will appear; which is also in a different name from that of her husband.

Gurney and Chitty, contra. It is not denied that she is a married woman; and, therefore, it is useless to keep her in custody, as she must ultimately be discharged.

Per Curiam. It is clear that the affidavit is not sufficient in a case like this. It is, at all events, necessary to swear positively that the party is a married woman. It is not necessary to decide what would be the case if that fact had been positively sworn to by the defendant.

Rule discharged.

1822.

CHAPPELL and Others *against* ASHLEY.Friday,
May 17th.

ANDREWS moved for a rule nisi, to discharge the rule obtained by the plaintiffs for bringing up the defendant, under the compulsory clause in the Lords' act, for irregularity, in consequence of the insufficiency of the affidavit on which it was drawn up. By 32 G. 2. c. 28. s. 16. notices are required to be served on all and every creditor or creditors at whose suit a prisoner is detained in custody, if such creditor or creditors can be found out or met with; and, if not, then to the several attornies last employed in the respective actions in which such prisoner shall be detained in custody. And it further provides, that every such prisoner, who shall be brought up, &c. shall, on proof being there first made of such notices as aforesaid having been given, deliver in open court a full, just, and true account, &c. The affidavit, on which the rule was obtained, stated, that *Mr. Bish*, one of the detaining creditors, had been served with a notice, by delivering and leaving a copy of it with one of his clerks, at his house in *Cornhill*. As to another creditor, named *Dickens*, it was sworn that he was resident abroad, and that the notice was personally served on *Mr. Pocock*, one of the firm of *Pocock and Co.*, his attornies; but it was not sworn that *Pocock and Co.* were the attornies last employed by *Dickens* in the suit under which the defendant was detained in custody. It was contended, in support of the motion, that the legislature, in requiring service on the creditor, if he can be found or met with, obviously must have meant personal

The notices required by 32 G. 2. 28. s. 16. need not be personally served on the detaining creditors. Where the service was sworn to be on the attorney of a creditor residing abroad, it was held sufficient, although the affidavit did not state that he was the attorney last employed in the suit under which the insolvent was detained, the objection being taken by the insolvent, and not on the part of the creditor.

1822.

CHAPPELL
against
ASHLEY.

personal service, and then the service on *Bish* was defective; and that the affidavit as to the service on *Pocock* was defective, in not following the words of the act. This act, if disobeyed, entails highly penal consequences on the defendant; and, therefore, the affidavit should be quite accurate.

Per Curiam. The service of these notices was quite sufficient; for, as to that, this provision of the act of parliament is, probably, directory only. It was not intended for the benefit of the insolvent, but of the creditors, who were to take an interest under the assignment of his property. And no objection is made on their parts.

Rule refused.

Friday,
May 17th.

SHADWELL against BERTHOUD.

Where a plea is so framed as that it may reasonably induce the plaintiff to consult counsel, in order to know how to deal with it, the Court will, on affidavit that such plea is wholly false, permit the plaintiff to sign judgment, as for want of a plea.

LAWES had obtained a rule to shew cause, why the plaintiff should not be at liberty to sign judgment as for want of a plea. The action was brought against the defendant as acceptor of a bill of exchange. Plea, that the plaintiff was indebted to the defendant in a larger sum, by virtue of a certain recognizance acknowledged in the Court of Exchequer, which recognizance was still in full force and unsatisfied, "as by the said recognizance, remaining in the said court, more fully appears;" and concluded, that the defendant was ready to verify this by the record: wherefore, &c. The affidavit stated, that this plea was wholly false.

Espinasse

Espinasse shewed cause, and contended, that there was no ground for this application; and that the proper course was, either for the defendant to have replied or demurred to the plea.

1822.

 SHADWELL
 against
 BERTHOUD.

Per Curiam. This rule must be made absolute, for the plea was obviously for the purpose of gaining time, and would naturally induce the attorney for the plaintiff to consult counsel upon it; and, in such cases, if the plea be false, the Court will permit judgment to be signed. If these pleas are to be tolerated, the defendants ought, at least, to be compelled to adopt old and well-known forms.

Rule absolute. (a)

(a) This rule was again laid down by the Court in *Body v. Johnson*, in this term. There the plea was the general issue as to all the plaintiff's demand, except a certain sum; and as to one-third of that sum a bond given in satisfaction; as to another third, a set-off; and as to the residue, a promissory note for the amount, given to the plaintiff, and still due. There, also, there was an affidavit that the plea was altogether false, and the Court permitted the plaintiff to sign judgment. In *Corbett v. Powell*, in the same term, the facts were these, Debt on bond by an executor. Plea, assignment of the bond before the death of the testator, and payment to the assignee. Replication, taking issue on the payment to the assignee. According to the ordinary practice, the similiter was added in the office; and after notice of trial given, the defendant, according to the ordinary practice, struck out the similiter, and demurred specially to the replication. There was an affidavit that the plea was false; and the Court, after hearing *Gaselee*, who shewed cause, and *Merewether*, in support of the rule, made the rule absolute for signing judgment, as for want of a plea.

Figure 2.

Saturday, June 10
May 1968

MEMORANDUM FOR THE RECORD

It is not a valid objection on shewing cause, that a rule to compute was moved on the day of signing interlocutory judgment for not bringing in the record.

11111 had obtained a Rule nisi for referring it to the Master to compute, &c. It appeared, that interlocutory judgment was signed for not producing the record on the 11th May last, and that the Rule nisi was obtained on the same day.

Reader shewed cause, and contended, that the party had the whole day to produce the record, and motion could not be made till the following day.

BAYLEY J. The moment the Court have pronounced interlocutory judgment, they may award a writ of inquiry, or refer it to the Master. We are only to consider how this will appear on the record, and there will be no error there; this rule, therefore, may be taken as absolute.

Rule absolute. (a)

(a) Abbott C. J. and Bell J. had left the court

1822.

HAYWOOD, Gent., one, &c. against CHAMBERLAIN. *Antwerp, May 16th.*

ACTION on a promissory note, dated 16th December, 1815, for 24*l.*, payable on demand: with other counts for work and labour, &c. The defendant pleaded his bankruptcy to all the counts, except that upon the promissory note, and gave notice to the plaintiff to prove the consideration for the note; he also obtained a Judge's order for particulars, under which the plaintiff had delivered a particular, stating the consideration for the note to have been business done by the plaintiff, as attorney for the defendant, prior to July, 1815. At the trial, at the Guildhall sittings in this term, before Abbott C. J., it appeared, that, on the 3d November, 1815, a commission of bankruptcy was issued against the defendant, under which he had obtained his certificate, and that the plaintiff was a commissioner named in the commission, and that he acted as such, and signed the defendant's certificate. The note was given in the interval between the second and third meetings under the commission. The debt for which the note was given, was not proved under the commission. Upon this, Gurney, for the defendant, objected at the trial, that the promissory note was invalid, inasmuch as the defendant was protected from the debt, for the business done for him by the plaintiff, by his certificate; and it could not be permitted, that a creditor should avail himself of his power as commissioner, and while the commission was in progress, to extort from the bankrupt a security for his debt. The Lord Chief Justice

A bankrupt in the interval between the second and third meetings under his commission, gave a promissory note as a security for a pre-existing debt to a creditor, who was acting as one of the commissioners at the time, and afterwards signed the bankrupt's certificate. The debt for which the security was given was not proved under the commission: Held, that such security was invalid, and that no action could be maintained upon it.

1822.

HAYWOOD
against
CHAMBERS.

thought that a person circumstanced as the defendant was, at the time that he gave this note to the plaintiff, could not be considered a free agent, and he directed a nonsuit. And now,

The Solicitor-General, by leave, moved to enter a verdict for the plaintiff. There was nothing in this case to shew any improper practice by the plaintiff, in order to obtain this note, or that any favour or threat was held out as an inducement. It is clear, that a security, given by a bankrupt, after a commission has been sued out, to a creditor for a pre-existing debt, is valid. *Trueman v. Fenton (a)*; and there is nothing to take this case out of the rule there laid down. Here it was an advantage to the other creditors; for the plaintiff not having proved his debt, the dividend to them was *pro tanto* increased by it.

Per Curiam. If a security be taken in order to induce a commissioner to sign a bankrupt's certificate, it would clearly be void; and it is against public policy, that any thing leading to that result should be allowed. A commissioner has an important public duty to discharge, and this would naturally have a tendency to warp his conduct in the discharge of it; and the bankrupt cannot be properly considered as a free agent, in giving a security under such circumstances.

Rule refused.

(a) *Comp. 544.*

1822.

THEY HAD
 BEEN
 MAY 20th.

The King against The Justices of LANCASHIRE.

J. WILLIAMS had obtained a rule nisi for a mandamus to the defendants, to enter continuances, and hear the appeal of *Samuel Stansfeld*, one of the overseers of the township of *Ashton-under-Lyne*, in the county of *Lancaster*, against the allowance of the sum of 24*l.* in the constable's accounts for that township. It appeared from the affidavits, that the constable, pursuant to the 18 *Geo. 3. c. 19. s. 4.* had laid his accounts before a vestry meeting, on the 26th *October* last, when the item in question, being the amount of the expenses of a prosecution for a misdemeanor against *Mr. Samuel Waller*, a dissenting minister, for preaching in the streets, was disallowed by the vestry. He then, pursuant to the act, laid the accounts, on the 1st *November* last, before two justices of the peace for the county, by whom the disputed item was allowed. Against this allowance *Stansfeld*, one of the overseers of the township, appealed. At the sessions, the remaining overseers, being seven in number, appeared, and being sworn, stated, in open court, their dissent from the appeal; and on this ground the sessions dismissed it, being of opinion, that unless the majority, at least, of the overseers concurred in it, the fifth section of the act gave no appeal.

The 18 *G. 3. c. 19. s. 5.* gives an appeal only in case the majority of the overseers concur in it.

AFFIDAVIT (2)

Coltman shewed cause. The Sessions have decided right in refusing to hear the appeal. By the 5th section of the 18 *G. 3. c. 19.* it is provided, that in case the

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against
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Lancashire

overseer or overseers of the poor of any township shall find the parish is aggrieved by any thing done or omitted by the constable, or shall have any material objection to the account, or to the determination of the justice mentioned in the 4th section, they may appeal. It is not said that the overseer or overseers, or any of them, may appeal. A discretion is vested in them by the act of parliament, which the majority are to exercise. And, here, the majority have decided against the appeal. *Res v. Pascoe* (a) is plainly distinguishable; for there was no discretion to be exercised by the overseers in that case. It was merely a ministerial act; and any one of them, therefore, was competent to put the law in force.

J. Williams, in support of the rule. The words of the act are, that the overseer or overseers may appeal, which makes this case stronger than *Res v. Pascoe*, where the singular number was omitted. This case is clearly within the mischief to be remedied; and, unless this appeal be allowed, it will be competent for the major part of the overseers, against the will of all the other inhabitants, to levy a tax upon them. It must always be in opposition to the majority of the rated inhabitants; for, if not, the accounts will not be disallowed by the vestry; and it is only after such disallowance that the act provides for their being laid before a justice, against whose determination this appeal is given. Under these circumstances, the Court will surely, for justice to the rated inhabitants, construe the appeal clause liberally. And this appeal is within the words of the act. Why should the word overseer, in the

(a) 2 M. & S. 245. singular

singular number, be, for the first time, introduced in the appeal clause, if it be not that one overseer may appeal? The act cannot be speaking of some supposed case, of only one overseer being in a township; for one overseer cannot exist, by law, so as to be capable of doing any act. If, by death, the overseers be reduced to one, he cannot do any act until some other is appointed. Then, unless the intention be, that one of many overseers shall have the power to appeal, this word, "overseer," is altogether without any meaning.

Abbott C. J. It is much to be lamented, that, in the different sections of this act of parliament, we should find a variety in the expressions used. But, looking at the whole, it seems to me that the words "the overseer or overseers," used in the 5th section, are to be construed in the same manner as the words "the overseers," used in the 4th; and that, by both, the collective body of the parish officers must be meant. I think, therefore, that the legislature did not intend thereby to give an appeal to any one of that body. It is urged, that by this construction the parish may sustain great injury; and, undoubtedly, it may happen that there may be no appeal, and that too contrary to the wishes of the majority of the persons rated. But this act of parliament seems to me to have intended to leave the appeal entirely to the discretion of the parish officers. In case the appeal be unsuccessful, costs are given; and, therefore, if we were to allow one of the overseers to appeal, and the Sessions awarded costs against him, he might possibly charge them to the parish rate. In *Rex v. Pascoe* this consequence could not have followed. I am, therefore, of opinion, that

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against
The Justices of
LANCASHIRE.

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against
The Justices of
LANCASHIRE.

there can be no appeal, unless the majority of the parish officers concur in it, and that the Sessions have done right in this case.

BAYLEY J. I am of the same opinion. The ~~mis-~~chief suggested in argument could not be altogether remedied, unless an appeal had been given to the persons rated, which clearly is not the case. The clause gives a power of appeal to the overseer or overseers, if they find that the parish is aggrieved. Now, that implies that they are to exercise a judgment, which must be done by the majority.

HOLROYD J. I think that, in this case, the right of appeal is given to the body of the parish officers, and that the majority of them are alone competent to exercise it, on the principle that, in the exercise of a public or general power, the majority are to act for the whole. Here, the appeal is only given where a grievance is found by them to exist. Now, if the majority, upon consideration, determine that there is no such grievance, it seems to me that the one in the minority ought not to be allowed to appeal, on the suggestion that he alone finds that a grievance exists. I think, therefore, that this rule should be discharged.

BESR J. concurred.

Rule discharged.

1822.

Ex parte DEACON.

HOLT moved for a mandamus to the commissioners of the Court of Insolvent Debtors, directing them to receive and hear the petition of one *Mary Deacon*, a prisoner confined in the King's Bench prison, and to proceed to an adjudication thereupon. The prisoner was a married woman, and had been arrested, together with her husband, for a debt due from her before coverture, and both were then in execution for that debt. An application had been made to the Court of Common Pleas, in which court the action had been brought, to discharge the wife, but that Court had refused. In consequence of this refusal she applied to the Court of Insolvent Debtors; filed her petition and schedule in due time, executed the regular assignment, and offered to submit to such other conditions as the Court, by the act 1 Geo. 4. c. 119. is authorised to impose upon insolvents seeking relief. The commissioners, however, were of opinion, that being a married woman, she was not entitled to the relief of the act, inasmuch as she could not comply with the terms of the 25th section, by which it is enacted, "that when an order is made for the discharge of a prisoner, the Court may order that a judgment shall be entered up against such prisoner, in some one of the superior courts of *Westminster*, in the name of the assignee or assignees of such prisoner, &c. &c. &c.; and that such prisoner shall execute a warrant of attorney to authorise the entering up of such judgment, and such judgment shall have the

A married woman who, with her husband, is in execution for a debt contracted by her before coverture, is not entitled to be discharged under the insolvent act; she not being capable of executing a warrant of attorney, and complying with the other terms required by the 1 G. 4. c. 119. s. 25.

1822. *Ex parte Deacon*. force of a recognizance." The commissioners considered this to be a preliminary condition to the granting of a prisoner's discharge, and inasmuch as a married woman could not execute a warrant of attorney, they considered her not entitled to relief. Mrs. Deacon had no property in her own right, or in the hands of trustees, out of which she could satisfy the debt. The husband joined in the affidavit, but he did not state that he was not possessed of property, or was unable to discharge the debt from his own funds.

It is contended, that the words of the 25th section were general, and did not limit the relief to any description of persons whatever. They were, "that it shall be lawful for any person who shall become actually in custody, upon any process whatever, &c. &c. to apply by petition in a summary way, to the Court, for his or her discharge." There is no exception which bars a married woman of this relief. By the 25th section a certain mode of proceeding is marked out for the relief of persons of unsound mind. This shews that the relief was intended to be universal; otherwise this particular exception would not have been introduced. Minors are daily discharged, although they cannot make any assignment of their property, or execute a warrant of attorney. The language of the 25th section is not imperative; the words are, that the Court may order judgment to be entered up, and a warrant of attorney to be executed. It is true, that a married woman cannot execute a warrant of attorney; but there is nothing in the act which makes the carrying up of a judgment and a warrant of attorney a preliminary condition to a prisoner's discharge. The applicant

applicant may remain a prisoner for life if she proved
satisfactory construction of the community as a whole
ind of a prisoner's discharge and inasmuch as a married

Dr. Garrison. We cannot interfere; on the basis of new
 minor case, not necessarily void, but voidable only, himbo
 a minor only enters a deed for his own benefit, of which
 woman cannot comply with the conditions of the contract
 and the statute forbids her to do so, therefore, no third
 power to discharge her; who is now her prison with her

husband, who ought to pay this debt himself, and has not sworn to his incapacity so to do. The court in which the action was originally brought, may order her discharge if they think proper; but we have no power, and we do not think that the commissioners of the Insolvent Debtors would have misconstrued the act of parliament.

in deciding, that a married woman who has no property to assign, who cannot execute a warrant of attorney, and comply with the other conditions, is not entitled to her discharge. Judge said he never knew a married woman as guardian for her own estate. Rule refused.

The King against The Justices of Flintshire.
JAMES in last Michaelmas term obtained a rule nisi for a certiorari to remove an order of Sessions

of this quantity of Flint dated 18th July last for heavy and
ingraded paying into the hands of the treasurer of that
county 2004.53 to enable him to pay that sum in part
payment of the claim of Messrs. Sargan. It appeared
that by a former order of Sessions the treasurer had
been empowered to borrow from Messrs. Sargan who

... were

1822.

The King
against
The Justices of
Flintshire.

were bankers, the sum of 1000*l.*, for carrying on the public works within the county, to be repaid by instalments. This money had been advanced, from time to time, in 1817 and 1818, and repaid in account, but further advances being made, the balance remaining due to the bank was 447*l.*, in part-payment of which this order was made. The affidavits on the other side stated, that the whole money had been, in fact, laid out for county purposes.

The Court, (after hearing *Scarlett, Littleclak*, and *D. F. Jones* against, and *Parke* in support of the rule,) made the rule absolute; observing, that this was a rate to reimburse persons for a debt previously contracted, which was clearly bad, inasmuch as the justices had no right, except by following the provisions of particular acts of parliament, which had not been done here, to anticipate the county rates, and so to make the expense ultimately fall on different persons from those who were by law liable at the time it was incurred.

Writ of certiorari granted.

LAUGHER against BREFITT and Another.

Monday,
May 20th.

In trespass against custom-house officers for taking plaintiff's goods, which had been returned in a deteriorated

TRESPASS against the defendants, who were custom-house officers, for breaking and entering the plaintiff's warehouse, and seizing and taking a quantity of verdigrise belonging to the plaintiff, on pretence of

state before action brought, a verdict was found for plaintiff, for the difference in price between the value of the goods at the time of the seizure, and the time when they were returned. The judge certified that there was probable cause for the seizure: Held, that the plaintiff was not precluded by the 28 G. 3. c. 37. s. 24. from taking out execution for the damages found by the jury.

its being *French* verdigrise, that had not paid duty. Second count, for taking the verdigrise. Plea, not guilty. At the trial, before *Abbott C. J.* at the *London* sittings after last *Hilary* term, it was admitted on the part of the defendants, that the verdigrise in question was of *English* manufacture, and, therefore, not liable to the payment of any duty. It appeared, however, that it was a very close imitation of *French* verdigrise; the paper, also, in which it was packed, and the string round the packages, being similar to the paper and string in which *French* verdigrise was usually packed. The defendants kept the verdigrise six weeks in their custody, and delivered it to the plaintiff before the action was brought, but in a damaged state, and it was sold by the plaintiff before the trial. The jury found a verdict for the plaintiff, on the second count, for 73*l.* 15*s.* 8*d.*, the plaintiff being precluded from recovering on the first, by the terms of his notice of action; and the Lord Chief Justice certified, under the 28 G. 3. c. 37. s. 24., that there was probable cause for the seizure. By that statute it is enacted, "That in case any action shall be commenced against any person on account of the seizing of any goods forfeited by virtue of the revenue acts, and a verdict shall be given against the defendants; if the Judge before whom such action shall be tried shall certify that there was a probable cause for such seizure, then the plaintiff, besides the thing so seized, or the value thereof, shall not be entitled to above 2*d.* damages, nor to any costs of suit." The plaintiff having entered up his judgment for the damages obtained at the trial, the *Solicitor-General* obtained a rule for setting aside that judgment, and for entering

1822.

Exhibits
against
Defence.

1822.

Lawrence
against
Barnard

entering up judgment for the plaintiff for 2*d.* damages only.

Marryat and *Sykes* now shewed cause. By the very words of the statute the plaintiff is expressly entitled to recover the thing seized, or the value thereof. The verdigrise itself could only have been recovered in an action of detinue. The damages in the present action are the difference between the value of the verdigrise at the time of seizure and the time when it was returned. The plaintiff was not obliged to take it back in a deteriorated state; but he might have brought an action for its entire value at the time of seizure. In *Baldwin v. Tankard* (a) it was decided, that a Judge's certificate, under this statute, that there was probable cause for seizure, did not deprive a plaintiff of his damages for injuries accompanying the seizure.

The Solicitor-General and *Gurney*, contra. The object of the statute was to protect the officers from paying any costs or damages where there was a probable cause for the seizure. At common law the plaintiff would have been entitled to recover damages for the seizure. By the statute he is deprived of that right. The owner of the goods is entitled to have them returned, or to recover the value, but that must mean the value of the goods when they are returned, and not at the time when they are seized. The object of the statute was to prevent frauds upon the revenue. At all events, the plaintiff made his election by accepting the thing itself; and it is too late now to ask for further damages.

(a) 1 H. Bl. 23.

ABBOTT C. J. I am of opinion, that the plaintiff is entitled to have judgment and execution for the damages found by the jury. The seizure, in this case, turned out in the result to be unlawful. Now, if the act of parliament had never passed, the plaintiff would have been entitled to recover damages for the injury he had sustained by the seizure and detention of his goods : and the value of them at the time they were seized, together with any loss he might have sustained by the seizure and detention, would be the measure of his damages. If, therefore, in the course of the cause, the goods had been returned, the plaintiff would still have been entitled to proceed for further damages. The act of parliament, in this case, deprives the plaintiff of his right to recover damages in respect of the seizure and detention of the goods ; but expressly reserves to him the right of recovering the thing seized, or the value thereof. I am of opinion, that the value thereof means the value at the time of seizure, and not the value at the time when the goods are returned ; and there being nothing to shew that the plaintiff accepted the verdigrise itself in full satisfaction, I think that he is entitled to have the difference between the value of the verdigrise at the time of seizure and the time when it was returned to him ; and that, being so, this rule must be discharged with costs.

1822.

—
~~Verdict~~
 against
 Defendant.

Rule discharged with costs.

1822.

Monday,
May 20th.MEULE and Another *against* GODDARD.

Where a new trial is ordered, the costs to abide the event, such event means the ultimate event of the cause, and therefore, if the verdict on the second trial be set aside, and on a third trial, the ultimate event is the same as at the first trial, the party will be entitled to the costs of the first trial.

IN this case the plaintiff having obtained a verdict on the first trial, a new trial was ordered, and the costs of the first trial were directed to abide the event of such trial. Upon the second trial there was a verdict for the defendant, which was also set aside. The rule for setting aside that verdict, was silent as to the costs. Upon the third trial, the plaintiff obtained a verdict. The master on taking the costs, allowed the plaintiff the costs of the first trial.

Gaselee now moved, that the Master might review his taxation, and contended, that the plaintiff could only be entitled to such costs, in the event of his obtaining a verdict on the second trial, which he had not done.

But the Court held, that the event of such trial meant the ultimate event of the cause.

Rule refused.

DOE Dem. PHILLIPS *against* ROE.

A tenancy by virtue of an agreement in writing, for three months certain, is a tenancy "for a term," within the meaning of the 1 G. 4. c. 87.

Upon a rule calling upon the tenant to enter into a recognizance under that statute, it is unnecessary to express in the rule nisi the amount of the security required.

A RULE had been obtained, calling on the tenant in possession, to shew cause why he should not, pursuant to stat. 1 Geo. 4. c. 87., undertake, in case a verdict should pass for the plaintiff, to give judgment of the term next preceding the time of trial, and also why he should not enter into a recognizance, by himself and two sureties, in a reasonable sum conditioned to pay the costs and damages which might be recovered by the plaintiff.

plaintiff in the action. The tenant had held the premises in question, which were of the annual value of 20*l.* under the lessor of the plaintiff, *for three months certain*, by virtue of an instrument in writing, which was annexed to the affidavits in support of the rule, and was not stamped.

1822.

DOX dem.
PHILLIPS
against
ROE.

D. F. Jones shewed cause. Here, as the agreement is not stamped it cannot be received in evidence, and then it does not appear at all that the defendant holds by an agreement in writing. The intention of the act was not to make any difference as to the admissibility of unstamped instruments, but to leave any objections as to the admissibility of evidence in the same situation, upon applications under this statute, as they would have been if the cause had been tried at Nisi Prius. If this had been an agreement only, it might have been doubted, whether, inasmuch as the subject matter was altogether less than 20*l.*, the instrument required any stamp; but this instrument, though called an agreement, enured in point of law as a lease, and therefore required a stamp, within 55 Geo. 3. c. 184., schedule part 1. Secondly, the case is not within the act of parliament, which applied only to cases of a demise for any term or number of years. Now here, the tenant held only for *three months*, and, indeed had only engaged for that term. The words in the statute must be read, term of years or number of years, otherwise a taking for a week might be considered to be a term, and might expose the tenant to all the extensive proceedings authorised by this act. If a different construction is to prevail, the insertion in the first section of the act, after the words "for any term," of the words "or number of years certain, or from

Official

year

1822.

Dea. deval.
Phillips
against
Roa.

year to year" is more surprising. The true construction is, to apply the act of parliament to cases of considerable lease or holdings from year to year, as long as both parties please, and not to extend to trifling cases of holding for minutes or hours only. Thirdly, the rule nisi should have specified the amount of the security for which the plaintiff's debt, if it were reasonable the tenant might not show any cause; if it were disproportionate or uncertain, he would be bound to do so.

Reader, in support of the rule, after stating that 55 G. 3. c. 184. schedule part 1., was confined to lease at a yearly rent, was stopped by the Court.

ABBOTT C. J. It is unnecessary to decide the question as to the stamp, for, even if a stamp were required we should enlarge the rule, and give the plaintiff time to get the instrument stamped. As to the second point, I think that the present was a "lease" in the meaning of the act of parliament. One of the main objects of the statute was, to save the landlord the necessity of going to trial, where the tenant might over vexatiously, and where the trouble and expense of an ejectment may be very disproportionate to the value of the premises. With respect to the third point, it appears to me to be sufficient, that the amount of the security should be specified when the rule is made absolute, as the Court will then be enabled to judge whether it may be a reasonable sum to be fixed, upon the circumstances of the case.

CHAMBER J. I am of opinion that the case is within the scope of parliament. It is a very beneficial statute, and it is, where the tenant has really no choice, much to be done beneficial to tenants, in saving them from needless expense.

1822.

Does dem.
PHILLIPS
against
ROZ.

CHAMBER J. and **CHAMBER J.** concurred.

Rule discharged. (a)

(a) See *Litt. s. 67.* and *Ch. Litt. 54. b.*

JONES against WOOLLAM.

DEBT on bond to the plaintiff, treasurer of a friendly society, &c. The condition set out on oyer was for the payment of a sum of money to the plaintiff, or his executor, treasurer of the friendly society above named, or the executors or administrators of the plaintiff, that the bond was executed by the defendant to the plaintiff, as treasurer of the society, and for the use and benefit of the society, and for no other cause or consideration whatever, and that the rules, orders, and regulations by which the society was governed, had not been exhibited, confirmed, or filed, at the quarter sessions, pursuant to the statute 33 G. 3. c. 54. To this plea, there was a general demurrer.

Debt on a bond given to plaintiff as treasurer of a friendly society. Plea, that the rules of the society had not been confirmed at the quarter sessions pursuant to 33 G. 3. c. 54. Held upon demurrer that the plea was bad, the bond being a good bond at common law.

CHAMBER J. in support of the demurrer, was stopped by the Court.

1822. *Bartholomew* contended, that the plaintiff in his character of treasurer to the society, had no authority to take the bond, inasmuch as the rules of the society had not been registered according to the provisions of the 33 G. 3. c. 54. s. 2.

JOHN
against
WOOLMAN.

Rule refused.

Per Curiam. If the plaintiff does not comply with the terms of the statute, he may not be entitled to the privileges conferred thereby, but as there is no express provision avoiding securities given to treasurers neglecting to register the rules, the bond is good at common law, and the plaintiff is entitled to the judgment of the Court.

Judgment for the plaintiff.

Don, on the Demise of the Earl of BRADFORD,
against ROZ.

Where a tenant holds from year to year, but without a lease or agreement in writing, it is not a case within 1 G. 4. c. 87. s. 1.

CAMPBELL moved for a rule, calling upon the tenant in possession, to shew cause why he should not undertake, in case a verdict passed for the plaintiff, to give judgment of the term next preceding the trial, and why he should not enter into a recognizance, conditioned to pay the costs in pursuance of the 1 G. 4. c. 87. s. 1. It appeared upon the affidavit, that the tenant held from year to year, and that the tenancy had been determined by a regular notice to quit: but there was no lease or agreement in writing.

BAXLEY J. The words of the statute are, "where the term or interest of any tenant holding under any lease or agreement in writing, any lands &c. for any term or number of years certain, or from year to year, shall

shall have expired, or been determined by a notice to quit. I think the words, "under a lease or agreement in writing," apply to the whole sentence, and are not confined to the case of a tenant holding for a number of years certain.

Rule refused.

The King against Hargrave.

QUO warranto against the defendant for using and exercising the office of bailiff or sub-bailiff of the borough of *Milbourne* port, in the county of *Somerset*. To this information the defendant pleaded several special pleas. The bailiff was the returning officer of that borough. *Mercwether* in last term obtained a rule to discharge the rule to plead several matters, and for striking out all the defendant's pleas except one, on the ground that this was not a corporate office, and therefore, was not within the 9 *Anne*, c. 20., and he cited *Rex v. Richardson* (a). And *Gaselee*, contra, had obtained a rule nisi for quashing the information, on the ground, that if this did not fall within 9 *Anne*, c. 20., the information itself could not be supported. Both rules were ordered to come on together.

Scarlett, *Adam*, and *Mercwether* for the crown, in support of their own rule, cited, in addition to *Rex v.*

Richardson, the cases of *Rex v. Wallis* (b), *Rex v. Williams* (c) and *Butler* N. P. title *Mandamus*, 204. 211.

(b) 32. above. (c) 5 T. R. 515. (d) 10 T. R. 102. And

An information in the nature of a quo warranto may be granted at common law within the 9 *Anne*, c. 20., against a party for exercising the office of a bailiff in the borough of *M.* although it was not a corporate office. *Quare*, whether in such a case the defendant may plead several matters.

1822.
The King
v. Reginald
Higginson.

And as to the other rule, they contended, that this was a proceeding at common law, and not founded on 9 *Ann.* c. 20., and they cited numerous instances of such informations granted at common law previously to the passing of that act. They were then stopped by the Court.

Gaselee and *Bayly*, contra, contended that, if this was not a corporate office, there was no right to file any information, and if it was, then the defendant had a right to plead double. The 9 *Ann.* c. 20. s. 8. obviously refers to cases like the present. The words in the 1st section are not necessarily confined to corporate offices. For the preamble speaks of offices in cities, towns corporate, boroughs, and other places. [*Abbott* C. J., there are the words "burgesses or freemen," which seem to confine it to places having burgesses or freemen.] In the 8th section, clearly the word borough has a more extensive signification, and it is strange, if the same word is used to signify two different things in the same act of parliament. The 32 *G. 3.* c. 58. corroborates this view. For, if that does not extend to other than corporate offices, there will be many cases where, after six years' possession, the party may be ousted by quo warranto. [*Bayley* J. It is in the discretion of the Court to grant such rules, and probably they would not do it in such cases.] Here, the defendant has no other way of raising this point. The other side may, if there be no power to plead several matters, demur, and so the question will be on the record.

ABBOTT C. J. It is too much to ask of the Court to quash an information founded, like the present, on numerous precedents, previous to the passing the

statute

statute 9 Ann. c. 20, and that, too, in a case in which it is open to the defendant, by writ of error, to raise the point. That rule must, therefore, be discharged. On the same principle we shall proceed with the other rule. If we make it absolute, we shall altogether prevent the defendant from setting our judgment right by writ of error; but if we discharge it, and the defendant pleads double, the error will be on the face of the record, and then the prosecutor may take the case ultimately before a higher tribunal.

Both rules discharged.

The prosecutor did not demur, but filed replications to all the pleas.

The King against ROGERS.

Monday,
May 20th.

SCARLETT had obtained a rule nisi for a certiorari to remove an order of Sessions, of the town and county of Nottingham, confirming a warrant of distress, signed by two magistrates, for enforcing the payment of wages, said to be due from *Thomas Kay* to *William Rogers*, for work done by the latter in the silk manufactory and the cotton manufactory. The wages, for which the warrant issued, had been paid previously in goods, which payment the magistrates altogether disallowed. The Sessions, on appeal, considered the point of law so doubtful, that they confirmed the order, subject to a special case. The question was, whether the certiorari was taken away.

The 17 G. c. 56. s. 22. takes away the writ of certiorari only from offences for the first time created by 22 G. 2. c. 37., and does not apply to those created by 12 G. 1. c. 34., and extended to the silk and cotton trades by 22 G. 2. c. 37.

Dennis shewed cause. There is no authority to issue a certiorari in this case. By 12 G. 1. c. 34. s. 3. clothiers

1842

The King
against
Rogers.

clothing in the woollen manufacture were prohibited from paying wages to their workmen, partly in goods, and by the 4th section, a penalty was imposed on them for so doing. Now, the provisions, penalties, and forfeitures under that act contained, were, by 22 G. 2. c. 27. s. 12. expressly extended to workmen in the silk and cotton manufacture, and the penalties and forfeitures were to be inflicted, levied, and recovered, in the same manner as those in the 12 G. 1. c. 34. Then came 17 G. 3. c. 56. s. 22., which took away the writ of certiorari in cases of proceedings for offences against the 22 G. 2. c. 27. The certiorari is, therefore, taken away here; for this is clearly an offence under the 22 G. 2. c. 27.

Scarlett and N. B. Clarke, contra. The certiorari is not taken away; for this is substantially an offence under the 12 G. 1. c. 34. The only effect of 22 G. 2. c. 27. was to extend the provisions of that act to the silk and cotton trade; but the offence was not by that act prohibited, but by the former. There are offences created by the 22 G. 2. c. 27., for the first time, to which the clause in the 17 G. 3. c. 56. most properly applies. Here, a special case, on a nice question of law, has been reserved by the Sessions; and, unless the writ of certiorari is expressly taken away, the Court will not refuse to grant it.

BAYLEY J. (a). By the 22 G. 2. c. 27. a variety of specific offences were created; and that having been done, by the last clause, the provisions of the act of 12 G. 1.

(a) *22 G. 2. c. 27. and 17 G. 3. c. 56. s. 22.*

c. 34. were extended to the silk and cotton trade. Now, I think that the best construction we can give to the 17 G. 3. c. 56. s. 22., on which this question turns, will be to hold, that it extends only to the offences created for the first time by the 22 G. 2. c. 27. If so, the writ of certiorari, in the present case, is not taken away.

1822.

The King
against
Rogers.

HOLROYD J. concurred.

Writ of certiorari granted. (a)

(c) See 17 G. 3. c. 56. s. 20.

The KING against The Inhabitants of OAKMERE. *Monday, May 30th.*

TWO justices, by their order, dated April 1st, 1821, removed John Bradford from the township of Over Tabley to the township of Oakmere, both in the county of Chester. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case. The township of Oakmere was before, and until the passing of a certain act of parliament in the 52d year of his late majesty, part of the forest of Delamere, in the county of Chester, and an extra-parochial place. Under and by virtue of the said act, intitled, "An act for inclosing the forest of Delamere, in the county of Chester," the forest was, in December, 1819, duly divided into four separate townships, of which Oakmere was one. Since that time overseers of the poor have been duly appointed for the township of Oakmere. The pauper, John Bradford, was born many

Where a district previously extra-parochial, was by act of parliament made a township; and it was provided, that from thenceforth it should maintain its own poor and repair its own roads, and have the like powers, privileges, and immunities, and be subject to the same regulations as other townships within the county: Held, that this clause was prospective only, and that a bastard born within the district previously to passing the act was not settled there.

1821/

The King
vs.
The Bishop of
Down

years ago, a business, in Down, which was an extra-parochial place, and part of the forest of Down. The question for the opinion of the Court was whether such order of removal to Down, as the bishopric of the parson, could be sustained.

The following were the reasons for the decision, which the question depended on, and the bishopric being, that the district called or known by the name of Down, and all such lands lying contiguous thereto, as are now extra-parochial, shall become as the moiety of the said forest, which is hereby directed to be allotted to and amongst the persons enjoying rights of common thereon shall have been so allotted, divided, and inclosed, be and be deemed and taken to be a parish, and called and known by the name of Down parish, and shall for ever thereafter be and be deemed and taken to be a rectory.

And be it further enacted, That the said commissioners shall, and they are hereby authorized and required to divide the said parish into two or more townships, to be called and distinguished by such name as the said commissioners shall appoint; and when the same shall be so divided, each and every such township shall, from thenceforth for ever thereafter, provide for its own poor, make and maintain its own roads, highways, enjoy, and be vested with such and the like rights, privileges, and immunities, and be subject to the same regulations as are incident to, and as are had, held, and enjoyed by the several other townships within the jurisdiction of Chester, by the laws and statutes of Great Britain and Ireland called

and the question for enclosing the forest of Down.

Nolan,

1808.
The King
against
The Inhabitants
of the
Parish of
Oakland.

*Plaintiff in support of the order of Sessions contended, that the section of the local act was retrospective, and that all acts done within the local limits of Oakmere, which would have conferred a settlement elsewhere, were sufficient for that purpose to confer a settlement in Oakmere after that place became a township. That is always the case where overseers are appointed for a vill, although the vicar or rectors have never been appointed before in Herefordshire, the clause makes them liable to the repair of roads, which must obviously extend to roads antecedently existing. In the case of a will, it must have been so for time immemorial; and, therefore, it was during all that time a place where legally a settlement could be gained. But here, it is made a township de novo. As to the roads, they were existing in Oakmere at the time it became a township, as well as before, and they, therefore, do not fall within the same reason as antecedent settlements, which had no such existence. The act must, as to the latter, be prospective; for, otherwise, injustice would follow. In this very instance, the mother of the pauper, at the time he was born, must have been removable to her own settlement elsewhere. But, being in an extra-parochial place, she could not then, for that reason only, be removed. *Cur. adv. vult.**

And on this day, the judgment of the Court was delivered by the Lord Chancellor of Great Britain and Ireland called

ABBOTT C. J. This case arises on the act 52 Geo. 3. for enclosing the forest of Delamere, and the question is,

1838:
 The Court
 against
 The Inhabitants
 of the
 Quakers O

is, whether the district newly created into a township under this statute, which before was neither in any parish nor township, is to be considered as if it had formerly been a parish or township, with regard to settlements; or, only as becoming so from the time of its creation under the act, and as if it had formerly been wholly uninhabited. And we are of opinion, that the latter is the true construction and effect of the statute. If the former construction should be adopted, much inconvenience and litigation might ensue. Many parishes, wherein paupers have been considered as legally settled, and have accordingly been maintained, might relieve themselves from their burthen, by removing to this new township not only illegitimate persons born within the district whereof the township consists, but also many of those who had been servants or apprentices, or had rented tenements of the yearly value of 10*l.* within it. By such removals a heavy burthen might be thrown at once upon the new township. It is true, on the other hand, that the new township, having now overseers, may remove persons which the inhabitants of the district could not previously do: but then the inhabitants were not previously under the same legal obligation to maintain the poor who might be found within it, as a parish or township; the consequence of which must have been that such poor would, in general, find their way without removal into those parishes or townships that were compellable to maintain them; so that the new power of removal would not be likely to afford a relief commensurate with the new burthen: and the former want of the power of removal might have the effect of charging this new township with the maintenance of persons under circumstances in which, if

if the district had been previously a township, the inhabitants might have taken care to prevent the burthen from falling upon them, as by the removal of unmarried pregnant women, or of persons coming to settle on tenements under 10*l.* a year, especially before the stat. 35 Geo. 3. c. 104. The latter, indeed, would not acquire a settlement for themselves, but settlements might be derived under them by apprentices and servants. And this is not like the case of a modern appointment of overseers to places that formerly had no such officers; because all such places must have been void from time immemorial, and consequently under a legal obligation to maintain their poor, and possessing a legal right to the appointment of officers, and by such appointment to remove persons under the same circumstances as other townships or parishes might do. The consequence of this opinion is, that both the orders must be quashed.

Both orders quashed.

1823

The Bill
against
The Duke of
and the
O. 1823

1822.

1822.

The King
v. Samuel Blockley
The Inhabitants of
Barleston.

Where a parish apprentice was assigned by his original master to J. S. by an instrument in writing, but there was no consent of two magistrates: Held, that this was not a lawful assignment under 53 G. S. c. 57. s. 7., but it was sufficient to show the consent of the first master, to the service to J. S., and consequently, such service was good as a service under the original indenture, and conferred a settlement.

which he might or ought to have in him by virtue of the said indenture. And the said John Greasley conveyed with the said Samuel Blockley, the said Samuel Blockley, showing, notwithstanding anything to be done by Greasley during the said term of years, well and

TWO justices removed **Samuel Blockley** and his family from the parish of **Heather**, to the parish of **Barleston**, both in the county of **Leicester**. The sessions on appeal confirmed the order, subject to the opinion of this Court on the following case. In support of the order, a settlement by apprenticeship under a parish indenture to **John Greasley** in the appellant parish, was proved. The appellants, in order to show a subsequent settlement in the parish of **St. Mary, in Leicester**, gave in evidence a paper purporting to be an assignment of the pauper, in **February 1812**, by the said **John Greasley** to **Thomas Dalby** of that parish, and proved a residence of more than 40 days in the same parish under that assignment. There was a premium of 5*l.* paid by **Greasley** to the new master, but it was the sum which he, **Greasley**, had received with the pauper, on the original binding from **Heather**. The instrument by which the assignment was made, was in writing, and was executed by **Greasley**, **Dalby**, and the pauper. The instrument, after reciting that the apprentice had about

eight years of his term unexpired, as appeared by his indenture; stated, that for divers good considerations, **Greasley** did fully and absolutely give, grant, assign, and set over unto **Thomas Dalby** of the borough of **Leicester**, framework-knitter, all such right, title, duty, term of years to come, service and demand whatsoever, which the said **John Greasley** had, in or to the said **Samuel Blockley**,

on which he might or ought to have in him by virtue of the said indenture. And the said *John Greasley* covenanted with the said *Thomas Dalby*, that he, the said *Samuel Blockley* should, notwithstanding any thing to be done by *Greasley* during the said term of years, well and

truly serve the said *Thomas Dalby* as his master, &c. Provided, that the said *Thomas Dalby* shall well entreat and use him, and learn him the craft, mystery, and occupation of a frame-work knitter; and should also, allow him sufficient meat, &c. which the said *Thomas Dalby* agreed to do in consideration of the services of the said apprentice; and also, the sum of 5*l.* agreed to be paid by *Greasley to Dalby*, being the said sum of money, which he, the said *John Greasley* received with the said apprentice, from the churchwardens and overseers of *Heather*, on their putting and placing him, the said *Samuel Blockley*, apprentice to the said *John Greasley*.

It was objected by the respondents, that this assignment was not made under the 32 G. 3. c. 57. with the consent of two magistrates in writing; and therefore, was not an instrument under which a settlement could be gained. The appellants contended, that it was a valid instrument to confer a settlement, and cited the 56 G. 3. c. 139, s. 9, which passed subsequently to the assignment. The case was argued on a former day by

Phillips and *Daarvis*, in support of the order of sessions. This was not a valid assignment of the apprentices not having been made with the sanction of two justices. The 32 G. 3, c. 57, s. 7 provides, that it shall be lawful to make assignments in writing, of parish apprentices by consent of two magistrates. And this is compulsory, it being for the benefit of the apprentice, that a controul of this sort should be exercised. It is

1822.

**The King
against
The Infidels
and Of you
BARLETON.**

[illegible]

argued, that 56 G. 3. c. 129. s. 9. shows that this is not the true construction, but that there might be valid assignments not in writing, and not with consent of two justices. But this is easily explained: for the 9th section of 32 G. 3. c. 57. provides, that the 21st section shall not extend to cases where the premium given exceeds 5*l*. The 56 G. 3. c. 129. s. 9. extended the provision to all cases, whether the premium was more or less than 5*l*. The two clauses are therefore quite consistent. But, secondly, this is not good as a consent. For it was given *alio intuitu*, and that which is not valid as an assignment cannot be made good as a consent.

G. W. Marriott and Simons, contra. This was a good assignment. The 82 G. S. c. 57. s. 7. only extends to cases of apprentices, whose masters being compellable by virtue of 8 and 9 W. 3. c. 30. s. 5. to take more than is convenient to them, may be forced to assign such apprentices over to other persons. But this apprentice was not in that situation. There are many instances in which cases of parol assignment have come incidentally before the Court without objection; yet all these cases would have been wrongly determined, if this be correct. The 56 G. S. c. 139. s. 2. was passed for the very purpose of correcting this evil, and shews by its prohibition of such assignments in future, that therefore they had been valid. But secondly, at all events, this amounted to a consent by the first master, that the apprentice should serve the second. Here, he clearly knew and consented to the particular service. In what form that consent be given is immaterial, if in fact a consent be given. A settlement was therefore gained by the latter service, and the order of sessions is wrong.

Ger. ada. vult.

Add

And now, on this day the judgment of the Court was delivered by

1822.

The King
against
The Inhabitants
of
East Bridgford.

ABBOTT C. J. We are of opinion that this pauper gained a settlement in the borough of *Leicester*, and consequently, that the rule must be made absolute for quashing the order of removal, and the order of sessions confirming the same. The assignment of the apprentice and the service to his new master, were prior to the prohibitory statute 56 Geo. 3. c. 189, and, therefore, are not affected by it. The prior statute 32 Geo. 3. c. 89a. 7) is not a prohibitory but an enabling statute.

Before that statute, a master could not discharge himself from the obligation to maintain a parish apprentice, by assigning him to another person, nor were the apprentice and the new master subject to the ordinary jurisdiction of the justices, with respect to masters and parish apprentices. This appears by the preamble to the statute, and then the act proceeds with certain enactments, whereby if the terms are complied with, these inconveniences are remedied. If the terms are not complied with (and in the present instance they were not) the case is not within that statute; but it is to be considered, with regard to the law, as it stood before that act was passed. And so considered, although the assignment may be for many purposes inoperative, yet it manifests a consent of the first master to a service with the second, and renders that service a service under the original binding. This is established by the cases of *Rex v. The Inhabitants of East Bridgford (a)*, and *Rex v. The Inhabitants of St. Peter's (b)*. In the first

(a) Burr. S. C. 133.

2 Burr. 407, S. C.

(b) *Ibid.* 248.

1822.

—
The King
against
The Inhabit-
ants of
BARKENTON.

of those cases, the widow of the first master, who was of *Orston*, without taking out administration to her husband, assigned the apprentice to one *George*, at *Stamton*, and *George*, afterwards, by parol, assigned him to one *Baggaley*, at *East Bridgeford*; and it was held, that he gained a settlement by the service at *East Bridgeford*, by reason of the consent. In the last of these cases the apprentice, under the original binding, was in *S. P. P.* and the first mistress indorsed the indenture, and delivered it up, together with her interest in the apprentice, to one *Peale*, of *Stoke Fleming*, and the apprentice, by a new indenture, to which the mistress was not a party, voluntarily bound herself to *Peale*, and served him at *Stoke Fleming*; and the Court held, that through an assignment of an apprentice (except by contract in writing) cannot strictly be made; yet, as this assignment was with the assent of the mistress, the assignment would be good, for the purpose of conferring a settlement; for the servitude continued under the new indenture. And these cases, and some others determined upon the same principle, appear to have been recognised by the Court, in the case of *The King v. The Inhabitants of Christoe* (a), in which case the first master had re-assigned the apprentice, but had taken upon himself to bind her out anew, with her consent, to another person, by a new indenture of apprenticeship; and the Court, on that account, thought that the service to the second master could not be considered as a service under the original indenture.

Order of removing the apprentice.

(a) 11 East, 26.

1822.

**Dec. on the Demise of JOHN GILLARD against
RICHARD GILLARD.**

EXECUTMENT for freehold lands, situate in the parish of *West Abington*, in the county of *Devon*.

At the trial, before *Graham B.*, at the *Dress Summer assizes, 1821*, a verdict was found for the defendant, subject to the opinion of the Court on the following case:

John Gillard, the lessor of the plaintiff, was the heir at law of *Richard Gillard*, his uncle, deceased, who, at the time of making his last will, and at the time of his death, was seized in fee-simple of several freehold and leasehold tenements; that is to say, of a certain freehold tenement, consisting of a dwelling-house and garden, with the appurtenances, called *Greenhill*; two other distinct freehold tenements, the one consisting of three cottages and gardens, with the appurtenances; and the other of four cottages and gardens, with the appurtenances; and a small leasehold garden near to the tenement, called *Greenhill*; all situate in the parish of *Dodbrooke*, in the county of *Devon*; six acres of land,

A., at the time of making his will, was seized in fee of certain freehold and leasehold premises, and, amongst the rest, of a dwelling house, which he inhabited, in the parish of *D.*; and six acres of land, situate in the parish of *S.*, a mile distant from the village of *B.*; and seventy acres of leasehold land, in and near the village of *B.*; and fifty-eight acres of freehold land, and some leasehold land in the parish of *W.* *A.*, at the time of making his will, resided in the dwelling house, and had in his own oc-

cupation all the land in the parish of *W.*, the freehold lands in the parish of *S.*, and leasehold lands near the village of *B.*; but the freehold lands in the parish of *D.* were in the occupation of tenants. Before the making of the will, *A.* had contracted to sell all the lands in the parish of *S.*, and the leaseholds near the village of *B.*. The amount of *A.*'s debts at the time of his death exceeded his personal property. *A.*, shortly before his death, made a will as follows: "I direct my debts, legacies, and funeral expenses, to be paid; with the due payment whereof I charge my real estates. I give to my nephew, *T. G.*, 700*l.*, to be paid by my executor; and to my nephew, *J. G.*, (the heir at law) 20*l.*, to be paid by my executor; and, lastly, I constitute *R. G.* my sole executor of all my lands for ever, and all my leasehold property here or at *B.*, or money that shall become due for the same, paying certain annuities thereout by half-yearly payments:" Held, that by this will the executor took a fee in the freehold lands in the parish of *W.*

1822.

Don dem.
GILLARD
against
GILLARD.

situate in the parish of *Stokenham*, in the same county, and upwards of a mile distant from the village of *Beeston*, in the parish of *Stokenham*; and of several leasehold tenements, and about 70 acres of leasehold land, in and near the village of *Beeston*; and of about 58 acres of freehold land, in five several distinct freehold tenements; and one leasehold tenement, consisting of 23 acres, situate in the parish of *West Alvington*, in the said county: but these estates were originally parts of a manor of *Dodbrooke*, and were, in 1812, purchased by and conveyed to the testator, *Richard Gillard*, as parts and parcels of such manor, on a general sale and division thereof, and which manor has, from that time, ceased to exist. *Richard Gillard*, the uncle, at the time of making and publishing his will, and at the time of his death, resided in the dwelling-house called *Green-hill*, and had in his own occupation all the land in the parish of *West Alvington*, and also the freehold lands in the parish of *Stokenham*, and leasehold tenement and leasehold land situate in and near the village of *Beeston*; but the freehold cottages and gardens, and the small leasehold garden in the parish of *Dodbrooke*, were in the occupation of tenants. The freehold land in *West Alvington* consisted of ten distinct closes or fields, eight of which lie together, except being separated by the highway; the other two were separated from these eight by estates belonging to other persons; and the nearest field to the residence of *Richard Gillard*, the uncle, was distant from it, by the common road, by somewhat less than half a mile. Before the making of the will, *Richard Gillard*, the uncle, had contracted to sell to one *Norman* all the lands situate in the parish of *Stokenham*, and the leaseholds in and near the village of *Beeston*, for the sum of 2040*l*. The amount of the testator's debts, at the

the time of his death, exceeded his personal property. On the 6th day of September, 1819, *Richard Gillard*, the uncle, made his last will, duly executed so as to pass real estates, as follows: "First, I will and direct that all my just debts, legacies, and funeral expences, shall be fully paid and discharged; and with the due payment whereof I do hereby subject and charge all my real estates, messuages, lands, and tenements; first, I give and bequeath unto my nephew, *Thomas Gillard*, of *Higginch*, 700*l.*, to be paid by my executor; likewise, to my nephew, *John Gillard*, the sum of 20*l.*, to be paid by my executor; I give mortgage of *Bartlett's* house to *Richard Gillard*, my executor; lastly, I do make, constitute, and appoint *Richard Gillard* my whole and sole executor of all my lands for ever, and leasehold property, here or at *Boston*, or money that shall become due for the same, paying *Maria Bartlett* 12*l.* per annum, by half-yearly payments: and my sister *Elizabeth* 20*l.*, by half-yearly payments. I give 50*l.* due from my brother's will to me, to my executor." *John Gillard* and *Richard Gillard*, mentioned in the will, were the plaintiff and defendant.

1822.

For adm.
Gillard
against
Gillard.

The case was argued on a former day in this term by *Carter* for the plaintiff, and *Adam* for the defendant. The cases of *Clements v. Cassey* (a), and *Piggott v. Pentice* (b), were cited for the plaintiff. The arguments on both sides were so fully reviewed in the judgment of the Court, that it is unnecessary to report them.

Cur. adv. vult.

And now on this day the judgment of the Court was delivered by

(a) *Noy's Rep.* 48.(b) *Pres. Ch.* 471.

1822.

Don dem.
GILLARD
against
GILLARD.

ABBOTT C. J. Upon this will, considered as it ought to be, with reference to the state of the testator's property, we are perfectly satisfied that the testator intended that his executor should take all his freehold property; and we also think the words of the will sufficient to give effect to this manifest intention. It is found that the amount of the testator's debts exceeded the value of his personal property. The amount of a man's debts and the value of his personal property are subject to so much variation, from time to time, that, in general, very little reliance can be placed on such a fact. In the present case, however, the will was made so recently before the death of the testator, that it may be presumed to have been made with a view to that state of facts as likely to exist at the time of his death; and accordingly we find, that by his will he has charged all his real estates, messuages, lands, and tenements, with the payment of all his debts, legacies, and funeral expenses; and having so done, he immediately gives a legacy of 700*l.* to his nephew, *Thomas Gillard*, and a legacy of 20*l.* to his nephew, *John Gillard*, who is the lessor of the plaintiff, and the heir at law. If he had done no more, the charge would scarcely have led to any conclusion against the heir, because he might well take the freehold, subject to the first, which is the most important charge; but he has done more, for he has directed these legacies to be paid by his executor, which shews that he meant his executor to take the estates, as the necessary fund to pay the legacies. In the conclusion also of his will, and immediately after the clause containing the gift to the executor, come the words "paying to *M. Bartlett* an annuity of 12*l.*, and to my sister *Elizabeth* an annuity of 20*l.*," whereby the gift to the executor becomes chargeable with those annuities, and must, therefore,

fore, have been intended as a fund for the payment of them. This gift manifestly includes some part of the freehold estate; the question is, whether it includes the freehold at *West Alvington*, which was formerly parcel of the manor of *Dodbrooke*, and purchased by the testator as such, and which was in his own occupation, and at no great distance from his residence. The words of the gift are these: "I do make, constitute, and appoint *Richard Gillard* my whole and sole executor of all my lands for ever, and leasehold property, here or at *Beeston*, or money that shall become due for the same, paying, &c." The words "or money that shall become due for the same," manifestly relate to the contract whereby the testator had engaged to sell his freeholds at *Stokenham*, and leaseholds in and near *Beeston*, which is in the parish of *Stokenham*, for the single and undivided sum of 2040*l.*; and it is clear, that whatever restriction, if any, be found in the words "here or at *Beeston*," as to the first member of the sentence, must be applicable to the latter member also; so that if there be any freehold not under contract for sale to which the gift will not extend, neither will the gift extend to the freehold which was under contract for sale: and in this view of the subject, the executor will not be able to convey to the purchaser the freeholds at *Stokenham*, nor be entitled to receive the value of those freeholds, but there must be two conveyances, and also a division of the price. The will, however, makes no provision for such a division, and the testator manifestly never thought of it, nor contemplated its occurrence. The intention of the testator being, as we think, thus manifested; it has been contended, that effect may be given to it, first, by considering the words "here or at *Beeston*" as relating only to the leasehold property; or, secondly, by con-

1822.

DOE dem.
GILLARD
against
GILLARD.

1832.

Does decem
GILLARD
against
GILLARD.

Considering those words as descriptive of all the testator's property, both freehold and leasehold. The latter construction will obviate every difficulty that may otherwise arise in the execution of this will, as it will exclude all beneficial interest, not of the heir only, but also of the next of kin, and give the whole property of both kinds to the executor for his own benefit, subject only to the charges mentioned in the will, and prevent an intestacy, as to any interest legal or equitable, either direct or resulting from the operation of law. There appears to us, however, to be a greater difficulty in this second construction than in the first: it is easier to construe the word "here" as descriptive of the freehold at *Alvington*, under the peculiar circumstances of its occupation and situation, than to construe the words "at *Beeston*" as descriptive of the freehold in *Stokenham*, and as the leaseholds were of much less value than the freeholds, it is more probable that the testator should have omitted to make a proper description and gift of them, than that he should have done so with regard to the freeholds, which he has so manifestly charged with one very considerable legacy, to be paid by his executor, and with another, of small amount indeed, to be paid also by the executor, and to be paid to the heir at law, who will take the estates, and, therefore, cannot want the money to be paid out of them, if they are not given to the executor. And for these reasons, and without prejudging any construction that may hereafter be put upon this will, by any court who may be required to decide upon the interests of the next of kin, we think ourselves warranted in adopting the construction first proposed, and which is sufficient for the present cause; and we are of opinion, that the words of description, "here or at *Beeston*," whatever be their meaning, are to be confined

confined to the last antecedent, viz. "my leasehold property," and are not to be extended to the more remote antecedent, "my lands for ever:" for the gift those words contain is complete and perfect in itself, and does not require any other words to give effect to it, for the purpose of denoting either the thing given or the intended donee, and may, therefore, in furtherance of the manifest intention, be taken by itself, not qualified or restrained by the words that afterwards occur. For these reasons, we think the defendant is entitled to retain the verdict; and the *postea* must be delivered to him.

1822.

Dox dem.
GILZARD
against
GILZARD.

Judgment for defendant.

REX *against* DUGGER.

SELWYN had obtained a rule nisi for a habeas corpus, to bring up the body of the defendant, on the ground of a defect in the warrant of commitment. It appeared that the defendant was in custody under a warrant of the sheriff of *Cornwall*, issued by virtue of a writ de contumace capiendo, and commanding the officer "to attach *B. Dugger*, until he shall have made satisfaction for manifest contumacy, and contempt of the law and jurisdiction ecclesiastical, in not obeying his majesty's lawful commands, by paying, on a day now long past, to *J. J. Austen*, or to his proctor, 20*l.* 8*s.* 5*d.*, being the amount of costs taxed in a certain cause of appeal and complaint of nullity, lately depending in the Arches Court of *Canterbury*, between

A warrant issued in pursuance of a writ de contumace capiendo stated that the defendant was attached for non-payment of costs in a cause of appeal and complaint of nullity lately depending in the Arches Court of *Canterbury*: Held, that this warrant was insufficient in not stating with certainty the nature of the cause, so as to show that it was one apparently

within the jurisdiction of the Ecclesiastical Court.

1822.

The Key
against
Droghda.

J. J. Austen, appellant, and *R. Dugger*, appellee." It was objected, first, that it did not appear, on the face of the warrant, that the suit between *Austen* and the defendant was one within the jurisdiction of the ecclesiastical court; and, secondly, that no addition was given to the defendant's name in the warrant. On shewing cause, the significant was produced, in which the defendant was described as "he cooper."

Carter shewed cause. The writ de contumace capiendo is given by the 53 G. 3. c. 127. in lieu of the writ de excommunicato capiendo, against any person who shall not obey the lawful orders or decrees of the Court; and it is expressly provided, that it shall have the same force and effect as that writ, and that all rules and regulations, not thereby altered, applying to that writ, shall extend to the writ de contumace capiendo. Now, it is true that it has been held, that where the writ de excommunicato capiendo has been issued in an original suit, it must appear on the face of the writ that the suit was within the jurisdiction of the ecclesiastical court. But here the costs appear to have been taxed upon an appeal, which distinguishes this from all the other cases on the subject. The very ground of appeal might have been, that the party promoting the suit in the court below had instituted the suit for a matter not of ecclesiastical jurisdiction. And the description of the case, viz. a cause of appeal and complaint of nullity is the usual and technical description of causes in proceedings in courts of appeal. This appears from the precedent of sentences of courts of appeal, and of a commission of appeal, which are to be found in the Clerk's Instructor in the ecclesiastical courts, where the cause is stated in this

1892.

The King
against
Watson.

ceedings took place upon an appeal. For, from the report in Lord *Raymond*, it appears that Dr. *Watson* was arrested upon an excommunicato capiendo, being excommunicated for non-payment of costs, in which he was condemned by *commissioners' delegates*; and yet, there, a similar objection was taken to the present, and prevailed.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This was an application for a habeas corpus, to bring up the defendant, in order that he might be discharged out of custody, on the ground of a defect in the warrant of commitment. It appears, on the face of the warrant, that he was committed for contumacy, in not paying the taxed costs in a cause of appeal and complaint of nullity, then 'lately depending in the Arches Court of *Canterbury*: and it is contended, that this does not sufficiently shew that the cause was one of ecclesiastical jurisdiction. This writ de contumace capiendo was first given by the 53 G. 3. c. 127., and thereby made subject to all the rules and regulations applying to the former writ de excommunicato capiendo. Now, the principle to be collected from the several decisions upon that writ is this, that it must appear to the Court, upon the face of the proceedings, that the party was condemned in costs in a suit respecting a subject-matter apparently within the jurisdiction of the ecclesiastical court. Our doubt, yesterday, arose on the ground, that this was the case of an appeal; and, although *Regina v. Dr. Watson* was probably the case of an appeal, yet that fact does not very distinctly appear from the report in Lord *Raymond*. But we have

since

since found the case of *Rex v. Eyre* (a), where the suit appeared from the *significavit* to have been an appeal and complaint of nullity, which is exactly similar to the present. And in another case, of the same name (b), two *significavits* were quashed, being only said to be in a cause of appeal concerning a matter merely spiritual; and Lord *Talbot* is there reported to have said, "We are not to lend our assistance, but where it appears clearly that they have jurisdiction, and are not to trust them to determine what is a matter merely spiritual." Upon these authorities, which are not distinguishable from the present, we think that it does not sufficiently appear here, that this was a writ issued in a cause within the jurisdiction of the ecclesiastical court; and that the rule for a *habeas corpus* ought to be made absolute.

Rule absolute. (c)

(a) 2 Str. 1189.

(b) 2 Str. 1067.

(c) The defendant in this case was afterwards brought up before a Judge at Chambers and discharged.

1822.

The King
against
Ducan.

1822.

IRWINE *against* REDDISH.

A Judge's certificate under 43 Eliz. c. 6. is sufficient to deprive a plaintiff of costs, notwithstanding the action be brought under 11 G. 2. c. 19. s. 19, by which, in case the plaintiff obtains a verdict, he is entitled to full costs.

ACTION on the 11 Geo. 2. c. 19. s. 19. The first count charged the defendant with not having given notice of the place to which the goods distrained were removed. The second count, with not selling the goods distrained to the best advantage. At the trial, the plaintiff obtained a verdict, damages 1s., and the Judge certified, under the 43 Eliz. c. 6. A rule had been obtained, calling upon the defendant to shew cause why the plaintiff should not have his full costs, notwithstanding the Judge's certificate

Campbell now shewed cause. The words of the 43 Eliz. c. 6. s. 2. are prospective, for they extend "to all personal actions to be brought." The case of *Williams v. Miller* (a), is an authority in point. That was an action on the statute 34 Geo. 3. c. 23., for copying and selling a pattern of a calico print, of which the plaintiff was proprietor; the statute expressly gave the plaintiff such damages as a jury should assess, together with costs of suit, yet it was held, that the Judge's power to certify, under the 43 Eliz. was not thereby taken away. Here the statute gives full costs, but that can make no difference.

D. F. Jones, contra. The Judge has no power, under the 43 Eliz. c. 6., to certify so as to deprive the plaintiff of his costs, in an action founded on the 11 Geo. 2.

(a) 1 Taunt. 400.

c. 19. s. 19. The intention of the 43 *Eliz. c. 6.*, was, to prevent actions being brought in the superior courts, which might and ought to be brought in the county, or other inferior courts. Before the 11 *Geo. 2. c. 19.*, trespass *vi et armis*, was the proper form of action for a distress irregularly conducted; the landlord was then considered a trespasser *ab initio*, and the tenant was entitled to recover the full value of the goods distrained. The action of trespass *vi et armis* could not have been maintained in the county court, that court having no power to assess a fine.^(a) The fair inference then is, that the legislature did not intend the action given by the 11 *Geo. 2. c. 19. s. 19.* in lieu of the former remedy, by action of trespass, to be brought in the county court, where the former remedy could not have been had. Besides, that statute gives the plaintiff his option of an action of trespass, or on the case; and the power given to him of bringing trespass, seems to shew that it was not intended the action should be brought in the inferior court. Further, the statute in question expressly gives *full* costs of suit, and it gives different directions as to the costs to be recovered in certain specified cases. When, therefore, in the clause in question *full* costs are given, it must be taken to be costs of increase, and not mere nominal costs; and there is good reason for this construction, for, before the statute, the plaintiff would have recovered the full value of the goods, which would, in almost every case, exceed 40s., and, therefore, the Judge would have had no power to certify. The statute 11 *Geo. 2.*, while it limits the damages to be recovered to the amount of the injury consequent upon the irregu-

1822.

 IRWIN
 against
 REDDISH.

(a) 2 *Inst.* 311. 4 *Inst.* 266.

larity,

1822.

Lawine
against
Rendish.

larity, intended to place the tenant in no worse situation with regard to the costs. The case of *Williams v. Miller* is clearly distinguishable from the present; for there the statute in the section referred to gives costs in the ordinary way, and in another section, expressly gives *full* costs; which shews, that, where the legislature intended *full* costs, they so expressed it, and by costs, merely intended ordinary costs, liable to the ordinary power of limitation, by the certificate of the Judge.

Per Curiam. The case of *Williams v. Miller* is an authority to shew, that, where a statute, passed subsequently to the 43 *Eliz. c.6.*, gives an action, with costs of suit, the Judge's power to certify, under the latter statute, is not taken away. In this case the statute gives *full* costs; but that cannot make any difference, for no distinction is known in the law between costs and *full* costs, and in point of practice, there is no difference in the mode of taxation. If the legislature had intended, by the 11 *Geo. 2.*, to repeal the 43 *Eliz.*, they would have done it in express terms.

Rule discharged.

1822.

REGULA GENERALIS.

Easter Term, 3 Geo. 4.

To prevent unnecessary expense to plaintiffs suing in this Court, in case of notice given by prisoners of their intention to apply for their discharge under any act made for the relief of insolvent debtors, It is ordered, that after such notice given to any plaintiff, no prisoner shall be superseded or discharged out of custody at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of this Court, from the time of such notice given until some rule or order shall be made in the cause in that behalf by this Court, or one of the Judges thereof.

And it is further ordered, That a copy of this rule shall be hung up in the King's Bench prison, in the place where rules of this Court are usually hung up.

By the Court.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

1832.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Third Year of the Reign of GEORGE IV.

JOHN JAMES BEARD *against* WESTCOTT; JOHNSON (a), JOHN CARUTHERS, THOMAS COMBES and MARY his Wife, JOHN CARUTHERS the Younger, an Infant, MARY ANN COMBES, and ELIZABETH COMBES, Infants.

THE following case was sent by the Lord Chancellor *Devise to A.*
for the opinion of this Court. *John James* was, in *for 99 years, if*
his lifetime, and at the times of making his will, and of *he should so*
long live; re-
mainder to his
first son, then
unborn, for 99 years, if he should so long live, and so on in tail male to such first son lawfully
issuing for ever, and for want and in default of such issue of such first son, to the second
and other sons successively for 99 years only, in case he should so long live; and that such
elder son, or the issue of such elder son, should have no greater estate than for 99 years,
determinable at his decease; and if there should be no issue male of A. at the time of his
(A.'s) death, or in case there should be such issue male at that time, and they should all
die before 21 without issue male, then to B. for 99 years, if he should so long live; remain-
der to the first son of B. for 99 years, if he should so long live, &c.: Held, that A. took
under the will an estate for 99 years in the freehold estates, determinable with his life, and
the same estate in the leasehold, if they should so long continue, and that, upon his death,
his first son would take an estate for 99 years in the freeholds; determinable with his life,
and the remainder of the terms in the leaseholds: but, that the limitations to the second
and other unborn sons of A. were void as tending to perpetuity; and the limitations over
to B. &c. after these void limitations, were not accelerated, but were void also.

(a) *Westcott and Johnson* were guardians of the infants.

1822.

BEARD
against
WINTCOTT.

his death, seised in fee simple of divers freehold estates, and also possessed of divers leasehold estates for long terms of years, and made his will, duly executed and attested, for passing real estates, whereby he devised a particular estate, consisting of freehold and leasehold lands, unto his grandson, *John James Beard* and his assigns, so that he and they might receive and take the rents, issues, and profits thereof, to his and their use, during the term of 99 years, if he should so long live, subject to the provisos, conditions, and considerations thereafter mentioned: and immediately after his decease then to the first son of his body, lawfully to be begotten, and his assigns, to receive and take the yearly rents thereof, to his and their own use, for the like term of 99 years, if he should happen so long to live, and so on in tail male to such first son lawfully issuing for ever. And for want and in default of such issue of such first son, then to the use and behoof of the second and all and every other son and sons of *John James Beard*, severally, successively, and in remainder, one after another, as they should be in seniority of age and priority of birth, and the issue male of such son or sons, lawfully issuing, for the like term of 99 years only (in case he should so long live); and that such elder son, or the issue of such elder son, should have no greater estate than for the term of 99 years, determinable at his decease, and the elder son of such issue male always to take place before the younger of such son and sons, and the issue male of his and their bodies lawfully issuing, subject to the provisos and conditions therein mentioned: *And in case there should be no issue male of the said John James Beard, nor issue of such issue male at the time of his death, or in case there should be such issue male at that time, and they should all die before they should respectively attain 21, without lawful*

lawful issue male, then there were similar limitations over to *Joseph Beard* (the brother of *John James Beard*) and his sons, and issue male, with a similar gift over, in case there should be no issue male of *Joseph Beard*, &c., to his granddaughters, *Elizabeth Beard* and *Mary Beard*, sisters of *John James Beard* and *Joseph Beard*, and their assigns, to receive and take the rents, issues, and profits thereof, to their sole use and benefit (whether sole or covert) as tenants in common, and not as joint-tenants, during the term of 99 years, if they should so long live, and after their respective deaths, then to the first and other son and sons of their respective bodies, to receive the rents of the said premises, according to the respective interests of their mother, father, or grandmother, for the term of 99 years only, in case they should so long live, and so on toties quoties for ever; and in case there should only be one son of the bodies of *Elizabeth* and *Mary Beard*, then to such only son and his assigns, during the said term of 99 years, if he should so long live, and immediately after his decease, then to the first son of that son and his son, for the like term of 99 years only, if he should so long live; and that no issue male of his said granddaughters, or their respective issue, should take any greater estate or interest therein, than for 99 years at any one time, and so on for ever. There were similar limitations over, in like manner, to daughters of his four grandchildren. Then he gave another estate in like manner, giving the preference to *Joseph Beard*, and his issue. Then he gave another estate to *Elizabeth*, and her assigns, for 99 years, in case she should so long live; and after her decease, he gave the same to all and every the children of *Elizabeth* that should be living at the time of her death,

1828.

Beard
against
Widdowson.

1827.

BEARD
against
WILKINSON.

death, and their respective assigns, as tenants in common, for the like term of 99 years, if they should so long live; and in case of but one such child, then to such only child, his or her assigns, for the like term of 99 years, if he or she should so long live, and so on to their issue; and there was a like devise of another estate to the other granddaughter. (a)

John James, soon after the date and execution of his will, died so seised and possessed of such of his said freehold and leasehold estates without having revoked his will. *John James Beard*, the plaintiff, is the grandson and heir at law of the testator. *Joseph Beard*, brother of the plaintiff, and another of the devisees survived the testator, but died in *February*, 1804, at the age of 19 years, leaving one only son, who is since dead, an infant. *Elizabeth Beard*, another of the devisees, survived the testator, and afterwards intermarried with the defendant, *John Caruthers*, and died after attaining 21, leaving the defendant, *John Caruthers* the younger, an infant, her only child. *Mary Beard*, another of the devisees, intermarried with the defendant, *Thomas Combes*, and is still alive, having two daughters, namely, the defendants, *Mary Ann Combes* and *Elizabeth Combes*. At the time of the testator's death *John James Beard* had attained 21; but *Joseph Beard*, *Elizabeth Beard*, and *Mary Beard*, the other grandchildren were all infants. All of them, including *John James Beard*, were at that time unmarried. The following questions were submitted by the Lord Chancellor for the opinion of this Court:

First, what estate and interest did *John James Beard*, the grandson and heir at law of *John James* the testator,

(a) See the will set out at length in 5 Term. 395.

take in the freehold estates, and what estate and interest in the leasehold estates under the testator's will?

Secondly, whether all or any, and which of the limitations in the testator's will subsequent and expectant upon the limitation to *John James Beard*, for 99 years, if he should so long live, were void and contrary to law; or whether any, and which of such limitations were good and effectual, and particularly with reference to the circumstance that the limitations over (in the event of there being no son or sons of *John James Beard*, nor issue male of such son or sons living at the death of the said *John James Beard*, or there being such issue male at that time, they should all die before they attained their respective ages of 21 years without lawful issue male,) were to take effect at the end of a term of 21 years after a life in being, at the death of the testator, without reference to the infancy of the person intended to take, and to the circumstance that there might be issue of *John James Beard* living at his death to whom the estate was given by the will, for whose death, under 21, the limitation over in the event before mentioned, must await. This case was argued at the sittings before last *Michaelmas* term by

1822.

BEARD
against
WILKINS.

Sugden, for the plaintiff. There are two questions in this case; first, whether a gift for twenty-one years in gross, after a life in being, without reference to the infancy of the person who is to take, is void, as tending to a perpetuity; and, secondly, assuming the gift to *Joseph Beard*, standing by itself, to be valid, whether it and all the other limitations over, after the gift to the first unborn son of *John James Beard*, are not void. Here the gift is to *John James Beard* for 99 years, if he shall so long live, and, after his decease, the second gift is to

1822.

Reese
v. Reese
Washington

his first son, lawfully to be begotten, for the like term of 99 years, if he shall so long live, and to his issue in tail; but every one was to take for 99 years only, and then, in default of the issue of his first son, to the second, third, fourth, and other sons, and their issue in tail, for the like estate. Now, the first gift to *John James Beard* is valid, being for a life in being; the second gift to his first son is also valid, because it must take effect within 21 years and a few months (a) (allowed for gestation) after a life in being; but the gifts over to the issue of the first son, of *John James Beard*, are void, because possibly they may not take effect within 21 years and a few months after the determination of the life in being, viz. *John James Beard*; for, supposing *John James Beard* to die, leaving a son, and that son to marry at the age of 20, and die under 21, leaving a son; that son would not take the estate until he attained the age of 21 years; and, therefore, it would be unalienable until that time. The estate, therefore, would, by force of the limitations, be unalienable during the life of *John James Beard*; and if he died while his son was an infant of the age of one year, it would continue unalienable during the whole of his infancy, that is, for nearly 20 years, and if the latter married at 20 years of age, and died under 21, it would continue unalienable during the life of that son which would therefore be for a period of nearly 40 years after a life in being. The gift, to the second and other sons of *John James Beard*, in default of the issue of his first son, is of course too remote and void, as tending to a perpetuity. The will then contains a clause that, "in case there shall be no issue male of *J. J. B.*, nor issue of such issue male at the time of his death, or in case there should be issue male at that

(a) See *Sugden on Powers*, 430.

time, and they should all die, before they attain 21, without lawful issue male, the estate is to go to *Joseph Beard*, and his sons. There is no case in which it has been held that an executory devise may be limited to take effect 21 years after a life in being, without reference to the birth and infancy of the devisee who is then to take. The reason why 21 years and a few months are in such cases allowed as the period during which an estate may be unalienable is, in *Stephens v. Stephens* (a), expressly stated to be, that strictly the power of alienation would not be restrained longer than the common law would otherwise restrain it, viz. during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity. In *Long v. Blackall* (b), Lord *Kenyon* says, "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the Courts have said that the estate shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail, and until the person to whom the last remainder is limited is of age, the estate is unalienable." In *Crooke v. De Vandes* (c), a legacy given to the nephews and nieces of the testator, if at the end of 30 years from his decease neither of his two grandsons (both living) had any grandchild living, was considered to be too remote, and therefore void. In *Thelluson v. Woodford* (d), Lord *Alvanley* said, "As to the period of 21 years, it has never been considered as a term that may at all events be added to an executory devise or

1822,

 BEARD
 against
 WILCOX.
(a) *Can. temp. Talb. Forrester*, 232. *Vision's MS. Lincoln's Inn Library.*

(b) 7 T. R. 102.

(c) 9 Ves. jun. 197.

(d) 4 Ves. jun. 337.

1892.

BEARD
against
WILSON.

trust. I have only found this dictum; that estates may be unalienable for lives in being, and 21 years, merely because a life may be an infant, or en ventre sa mère." These are authorities to shew, that the period allowed by law, during which an executory devise may be limited to take effect, is derived by analogy from the period allowed in case of strict settlement. An executory devise, therefore, cannot be limited to take effect at the expiration of a term in gross of 21 years and a few months, after lives in being. For then the deviser would take the chance of the person who shall then become entitled, being an infant; in which case the power of alienation would be restrained longer than it would in the common case of a strict settlement. (a)

Secondly, assuming the gift to *Joseph Beard* to be good standing by itself, still it and all the limitations over after the gift to the first unborn son of *John James Beard*, are void, because it was the intention of the testator that those limitations should take effect, only in case the previous limitations were capable of taking effect and had failed. The decisions in the case of an excessive execution of a power, bear strongly upon this question. If a limitation be void as not authorised by the power, the remainders dependent upon it, which if given immediately, would have been good, are not accelerated, but the limitations over are prevented from taking effect. *Alexander v. Alexander* (b), *Robinson v. Hardcastle* (c), *Brudenell v. Elwes* (d), *Boulledge v. Darvil*, (e) In this last case Lord *Alvanley* observes, "it would be monstrous to contend, that though it was appointed to the remainder-man in failure of the existence

(a) See this point fully discussed in a note to *Gilbert on Uses*, p. 281. 3d edition.

(b) 2 Ves. 640.

(c) 2 T. R. 241.

(d) 1 East, 442.

(e) 2 Ves. jun. 357.

of persons incapable of taking, yet notwithstanding they
 could take as if it was well appointed to them,
 and they had failed. It is given upon a contingency,
 upon which there was no right to give it." *Crompe v.*
Burrows (a) is distinguishable from this case. There
 the gift was in the alternative, viz. to an object of the
 power in one event, in another not to an object of
 the power, and it was held, that on the happening of
 the former event, the gift was good. The power was to
 appoint to children, and the appointment was as to a
 moiety to a daughter, and as to the other moiety to a
 son for life, and upon his death, for his wife and children,
 and in case he should die without leaving a wife or child,
 then as to that moiety, to her daughter. And it was
 determined, that although the appointment to the wife
 and daughter was void, yet that as the event did not
 happen upon which that gift was to take place, it did not
 defeat the limitation over to the object of the power in
 the event provided for, and which did happen of the
 son's dying without leaving a wife or child surviving him.
 The same observation applies to the case of *Longhead v.*
Phelps (b). If indeed, the limitations over were not
 wholly void, this consequence would follow, that there
 might be a person in esse entitled to take according
 to the words of the first limitation in the will, but in-
 capable in law, and a remainder-man in esse capable
 of taking by law, but incapable of taking, because
 the contingency has not happened which was to deter-
 mine the preceding estate. As for example, suppose
 the gift had been to J. J. B. for 99 years, if he should
 so long live; remainder to his first son for 99 years, if he
 should so long live; remainder over in like manner to his
 issue successively; remainder to the other sons and their

1821
 BEAS
 WILSON

(a) 4 Ves. 651.

(b) 2 Black. 704.

1892.

Beard
against
Wardens.

issue for 99 years, determinable on their deaths; remainder to the heir at law of the testator, in fee, with an executory devise over as in this case to *Joseph Beard*. Now, the estates to *John James Beard* and to his first son are good, but the estates to the issue of the son, and to all the other sons after failure of the issue of the first son are void. Suppose that the first son of *J. J. B.* dies a month old, and then that he himself dies, leaving five sons, they and all their issue are cut out, because the limitations are too remote; but *Joseph Beard* is living, and desirous to take, yet is bound to wait the death of his five nephews without issue under 21. It may be laid down as a general rule, that where a preceding particular estate is void on account of a perpetuity, the remainders dependent upon it are also void. It is clear, that the testator intended the prior estate to endure until the period when the limitation over was to take effect. The will, therefore, must be read as if the testator had expressly said, "I never mean *Joseph Beard* to take in derogation of the rights of the persons to whom the estate is previously limited." In *Proctor v. The Bishop of Bath and Wells* (a), there was a devise of an advowson in fee to the first or other son of *B.*, that should be bred a clergyman and be in holy orders, but in case *B.* should have no such son, then to *C.* in fee. The first devise was held to be void as depending upon too remote a contingency, because the first or other son of *B.* could not take holy orders until he was 24 years of age, and the devise over as depending on the same event, was held to be also void, and the Court said, that the will would not admit of the contingency being divided as was the case in *Longhead v.*

(a) 2 H. Bl. 358.

Pelpe, and there was no instance in which a limitation after a prior devise which was void from the contingency being too remote, had been let in to take effect; but the contrary was expressly decided in the House of Lords, in the case of *The Earl of Chatham v. Tothill*. (a) Although, therefore, no son was born, the devise over was held void.

1832.
Banks
against
Wasson

Preston, contra. The 39 and 40 G. 3. c. 98., which passed in consequence of the case of *Thelluson v. Woodford* (b), may be considered as containing a legislative declaration of the law upon the head of objection, namely, the term of 21 years; for that statute keeps within the boundary of the rule. It enacts, that no person shall, by deed, will, or otherwise, settle or dispose of any real or personal property, so that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated, for any longer term than for the life or lives of such grantor, settlor, devisor, or testator, or the term of 21 years from the death of any such grantor, settlor, devisor, or testator, or during the minority of any persons who shall be living, or en ventre sa mere, at the time of the death of such grantor, &c., or during the minority of any person or persons, who, under the uses or trusts of the deed, will, or other assurances, directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest or annual produce so directed to be accumulated." This is a legislative declaration that property may accumulate during a life in being, and 21 years after the death of the grantor, &c. A new qualification is now

(a) 6 Bro. Ch. Ca. in Parl. 451.

(b) 4 Ves. jun. 227.

attempted

1837.
 ———
 Beane
 against
 Watroott.

attempted to be engrafted on the rule, that the 21 years must be in respect of, and during the minority of the beneficial owner; but if a settlor may select a person who cannot alienate for 21 years, it follows, that the period during which the property may be unalienable, may be a term of 21 years in gross, without any reference to the minority of the next taker. The opinion of Lord *Alvanley* in *Thelluson v. Woodford*, against such direct period of accumulation, is a mere *obiter-dictum*, not warranted by any authority, and opposed to those judicial opinions which allow that there may be a trust of accumulation or a suspense of ownership, for 20 or even 30 years. There are two sorts of gifts, viz. gifts to take effect by way of remainder, and gifts to take effect by way of substitution, or executory devise. A gift like the present might be too remote, if it were to take effect by way of remainder; but it does not therefore follow that it may not be good by executory devise, if it may operate in that mode. It may be admitted, that life-estates to persons in esse, cannot be limited, except for lives in esse; nor can there be a perpetual series of life-estates; therefore, an estate cannot be limited to *A.* for life, remainder to his first (unborn) son for life, remainder to a grandson, being the son of such first son, for life, or even in tail or in fee, so as to be valid in favour of the grandson. In the case before the Court, the subsequent gifts are not remainders. They are limitations for a term of years, determinable, and, therefore may operate by way of executory devise; and it is clear, that every executory devise which may vest within the period of a life or lives in being and 21 years is good. In *Scattergood v. Edge* (a) it was held, that an executory interest to arise

(a) 1 *Salkeld*, 229.

within a reasonable time was good, and that 20, nay 30 years had been thought a reasonable time. So it is, if within the compass of a life or lives, for let the lives be ever so many, there must be a survivor, and it is, at the utmost, only the length of that life; and *Lawrence J.*, in *Thelluson v. Woodford* (a), lays down the same rule. In *Gee v. Audley* (b) there was an appointment by will of 1000*l.*, in default of issue of *Mary Hall*, equally to be divided between the daughters living, (viz. at the failure of issue) of *John Gee* and *Elizabeth* his wife. Lord *Kenyon* said, "that neither real nor personal estate can be so settled as to be tied up beyond lives in being, and 21 years and a few months afterwards; that if the expression in that will had been daughters "now living," or "living at my death," it would have been good; but that as it stood, it might be to those born afterwards. The vices of this gift were the contingency, and the possible suspense for more than 21 years after the death of a life in being.

Secondly, Assuming the limitations to all the unborn sons except the first, are void, then the limitation to *Joseph Beard*, and the subsequent limitations, as far as they are within the compass of the rules against perpetuities, are accelerated, and *Joseph Beard* was entitled to take immediately on the determination of the estate limited to *John James Beard* and his first son. Besides, even though this gift be in itself too remote, and therefore void as far as it is by way of remainder, it may be good and have effect in the contingency which is expressed, being an event which is within the limits of the rule against perpetuities. In *Longhead v. Phelps* (c), a trust of a term to arise on a contingency, that *A.* and *B.* should

1822.

 BEARS
 against
 WARRICK

(a) 4 *Ves. jun.* 313. (b) 2 *Ves. jun.* 365. (c) 2 *Str. W. Black.* 704.

1897.

BEARD
against
WARRICK.

die without leaving issue male, or that such issue male should die without issue, was held to be too remote in one event, and good in the other event, (being the event which happened,) viz. *A.* and *B.* having had a son, who died without issue in the lifetime of the survivor. And in *Crompe v. Barrow* (a) it was decided, that an appointment which exceeded the power by a limitation to objects not within the power, was void only as to the excess. The power was to appoint to children, and the appointment was to a child for life, and after his decease to his wife and children. That void limitation, however, did not defeat or exclude a limitation over to an object of the power, limited expressly on the event that such child should die without leaving a wife or child surviving him. This case is an authority to shew, that a void limitation does not defeat a subsequent limitation, which is by express language brought within the limits of the rule against perpetuities. That is precisely the same case as this, for, in this case, the express provision, that there shall be no issue of such issue male living at the time of his (*John James Beard's*) death; also the contingency in case there shall be such issue male at that time, and they shall all die before they respectively attain their respective ages of 21 years, without lawful issue male, severally give the property in an event which does not infringe on the rule against perpetuities; consequently no rule of law, connected with the learning of perpetuities, denies effect to such a gift.

Civ. adv. ult.

The following certificate was afterwards sent :

This case has been argued before us, and we are of opinion, that *John James Beard*, the grandson and heir.

at law of *John James* the testator, took, under the said testator's will, an estate for 99 years, determinable with his life, in the freehold estates devised to him, in the first instance; and also in the leasehold estates devised, if they should so long continue, and that, upon his death, leaving one or more sons, his first son will take an estate for 99 years, determinable with his life, in the freehold estates, and what shall then remain of the terms for which the leasehold estates are held. We are also of opinion, that all the limitations subsequent and expectant upon the limitation to the first son of *John James Beard*, are void.

C. ABBOTT. .

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

1822.

BRASS
against
WHEATCROFT.

KILSBY *against* WILLIAMS and Others.

Saturday,
June 8th.

ASSUMPSIT upon the usual money counts and an account stated. Plea, general issue. At the trial at the *Guildhall* sittings after last *Easter* term before *Abbott* C. J., it appeared that the defendants were the bankers, both of the plaintiff and one *Robertson*, and that on the 13th *November*, 1821, the plaintiff paid in at

A plaintiff paid into his own bankers, a cheque of 250*l.* drawn upon them by a third person, which they received without any objection; and in the course of the same day the drawer of

the cheque paid in a sum of money, part of which he particularly appropriated, leaving a balance unappropriated of 237*l.* The bankers, who were then creditors of the drawers to a large amount, wrote on the next morning, to the plaintiff stating, that the cheque was not paid, but that they would keep it in the hope of there being money to pay it; and on that day a further unappropriated balance was paid in, making altogether a sum exceeding the plaintiff's cheque: Held, that, under these circumstances, the plaintiff might maintain money had and received against the bankers, and that the latter, being his agents for receipt of the money, could not appropriate the balance to the payment either of their own general account against the drawer, or of two cheques presented on the same day, but subsequently to that of the plaintiff, and paid by them.

the

1822.

Kenny
vs
Williams.

the defendants' counter, a cheque of *Robertson* on them for 250*l*. The cheque was received by their clerk without any thing being said, or any entry made. In the course of the same day *Robertson* paid in bills for 1600*l*., the produce of which he expressly appropriated to the charges of the day. This produce, after deducting the discount, amounted to 1579*l*.: the charges consisted of bills accepted by *Robertson* to the amount of 3842*l*. These were paid, and on the 13th *November* two cheques of *Robertson*, for 50*l*. each, were also paid. On the 14th of *November*, the defendants wrote a letter to the plaintiff, stating, that the 250*l*. cheque was not paid, and that they would keep it, in the hope of there being money to pay it, and they promised *Robertson* also to pay it when they had funds. On the 14th, *Robertson* paid in different sums of money, part of which was by him specifically appropriated to certain payments, leaving however, an unappropriated balance of 98*l*. On the 15th *November*, *Robertson* became bankrupt. During all these transactions, the defendants were in advance themselves to *Robertson* upwards of 9000*l*. The Lord Chief Justice left it to the jury to say, whether the cheque for 250*l*. was presented on the 13th, before the two cheques for 50*l*. each, which the jury found in the affirmative; and he directed them in that case, to find for the plaintiff, on the ground, that on the 14th *November*, they had, exclusively of their own account, a balance, of more than 250*l*. due to *Robertson* in their hands, and that under the circumstances, they had no right to appropriate that balance in reduction of their own account. The jury accordingly found a verdict for the plaintiff, damages 250*l*. And now,

Campbell

1882.

 KIRBY
 against
 WILLIAMS.

Campbell moved for a new trial, and contended, that here there was no specific appropriation by *Robertson* of this money, to the payment of the plaintiff's cheque, and therefore, the defendants had a right to appropriate the balances of 237*l.*, and 93*l.* to the reduction of their own account, *Williams v. Everett*. (a) In *De Bernales v. Peller* (b), the money was specifically paid in to discharge a particular bill; and therefore, the Court held, that an action would lie against the bankers there, who being the persons with whom the bill was deposited, were to be considered as the holders' agents for receiving the money due upon it. But that is not the case here. The promise in the defendants' letter, that they would hold the cheque in the hope of there being money to pay it, could only mean that they would keep it, and when their own balance was discharged, would appropriate the next money paid in by *Robertson*, to the discharge of this cheque. But, secondly, they had a right to take into account, the two cheques for 50*l.* paid on the 18th, and then, even if the balance of the 14th be added, there will only be a balance of 230*l.* in their hands. And, unless they had the full amount of 250*l.* in their hands, they were not bound to pay the cheque. Now it is clear, they had a right to deduct the payments of the two cheques for 50*l.* For they were paid prior to the letter written by the defendants, and were part of the charges of the day to which the sum of 1579*l.* was subjected. And the circumstance of their being paid in subsequently to the one for 250*l.* cannot affect the question. Till the end of the day the bankers could not tell whether the cheque for 250*l.* would be honoured

(a) 14 East, 582.

(b) 14 East, 590.

1822.

Know
against
Williams.

at all. For, till then, they could not tell what sums *Robertson* would pay into his account, or what drafts he might make on them in the course of the day. If this rule be not adopted, it will render it necessary for bankers in future to file their cheques as received, in order to ascertain their priority, and they will not be able to pay any in the course of the day, except at their own risk. This may produce serious evil to individuals, whose credit may be affected by the bankers' hesitation to pay their drafts. Here, the bankers were the plaintiff's agents to receive the money for this cheque, in case *Robertson* had paid in any specifically for that purpose. But he paid it in generally, and then they had a right to set it off against their general balance.

ABBOTT C. J. It is found as a fact by the jury in this case, that prior to the payments made by the defendants on the 13th of *November*, the cheque in question was presented to them. At that time *Robertson* owed them a large balance, and the question is, what was the effect of the presentment under such circumstances? At the outset of this cause, I thought that it was the duty of bankers under such circumstances, immediately to tell the person presenting a cheque for payment, that they had no sufficient funds to honour it. But it was urged by Mr. *Scarlett*, and I thought there was great weight in the argument, that this might be productive of serious inconvenience, in as much as it is often impossible to ascertain till the close of the day at the clearing house, what sums of money may be paid in to each particular account, and what are the drafts upon it. I think, therefore, that the defendants might, in this case, receive the cheque in question, subject to its being
honoured,

honoured, or not, according to the course of *Robertson's* dealing with them in that day. Now, on that day *Robertson* discounted with them bills to the amount of 1579*l.*, which sum he directed should be applied to the charges of that day, and after providing for the three *Manchester* bills, there remained, unappropriated, the sum of 237*l.* So the account stood on the 13th, exclusive of the two cheques of 50*l.* each, which the jury have found were presented subsequently to the cheque in question. And if the balance, instead of being 237*l.*, had exceeded 250*l.*, I should have had no doubt that the defendants were bound to appropriate it to the payment of the plaintiff. For when they received the cheque from him, they became his agents to receive the money upon it as early as possible, and if they could be allowed to appropriate the money received by them to the payment of subsequent cheques, it would be doing great injustice and injury to their own customer. But I doubted at the trial, whether they would be bound to pay the cheque in part. On the 14th of *November*, however, a letter is written by them, in which they state that the cheque was not paid, and that they would keep it in the hope of there being money to pay it. In the course of that day money was paid in, part of which was specifically appropriated, leaving a balance unappropriated of 93*l.* This sum being added to 237*l.*, exceeds the amount of the cheque in question; and I think, that under these circumstances, the defendants were liable to pay it, in preference both to the two of 50*l.* each, and to their own balance. I am therefore of opinion, that the verdict is right.

1822.

~~Robertson~~
 Robert
 William.

1822.

~~Ex parte~~
 Kilmer
 against
 Williams.

BAYLEY J. I am of the same opinion. The case of *De Bernales v. Fuller* decided, that where a customer paid in money to be applied to take up a particular bill deposited with the banker, and the banker appropriated it to the payment of his general balance, the holder of the bill might maintain money had and received for it. For being the agent of the holder, he must exert the same vigilance as the holder himself would have done. Here, on the morning of the 13th *November*, the cheque was paid in by the plaintiff, and from that moment the defendants became his agents to receive the money upon it. If the defendants had not been the plaintiff's bankers, he would have immediately demanded the money due upon the cheque, and then they must have either paid him, or if they had refused payment, he might have had immediate recourse to *Robertson*. In either case he would have had the advantage of the priority of his presentment over the holders of the two cheques for 50*l.* each. Now he ought not to be placed in a worse situation, because he was a customer of the defendants. At the end of the 13th *November*, the balance unappropriated was 237*l.*, excluding the two cheques for 50*l.* for the reason which I have before given, and if the case had stopped here, the plaintiff would only have been entitled to a verdict for that amount. But then, on the 14th *November*, a similar balance of 93*l.* unappropriated was paid in by *Robertson*, which made a sufficient fund for the payment of the plaintiff's demand. I think that these sums could not legally be appropriated by the defendants to the payment of their own balance, or to that of cheques subsequently presented. The verdict therefore is right.

HOLROYD

HOLROYD J. I am of the same opinion. The bankers receive this cheque from the plaintiff without any objection, and they were, therefore, bound, as agents for the plaintiff, to apply in payment of it the first monies received from *Robertson*, not specifically appropriated by him to the payment of other demands. And I think, therefore, that they were bound to pay it in preference to other cheques, subsequently presented, and also to the balance due from *Robertson* to themselves.

1822.

KILBY
against
WILLIAMS.

BEST J. As to the balance of 93*l.*, it is clear that the defendants were bound to apply that in payment of the plaintiff's cheque, in consequence of their own letter, by which they undertook, on the 14th, to apply any money coming in for that purpose. As to the other sum of 237*l.*, I entirely concur in the opinion pronounced by the rest of the Court.

Rule refused.

BULMER, against MARSHALL, Garnishee.

Saturday,
June 8th.

NORTON, in last *Michaelmas* term, had obtained a rule nisi for a writ of procedendo, to remove back the record of the judgment obtained in the Lord Mayor's court of the city of *London*, by the plaintiff, against the garnishee, the same having been removed into this court by certiorari. The affidavits stated, that the original suit was commenced in *August*, 1818, by the plaintiff, against *Thomas Broster*, and thereupon an attachment was duly issued and laid in the hands of *Marshall*. On the 15th of *May*, 1821, final judgment was given in the

The 19 G. 3.
c. 70. s. 4. is
confined to
those suits in
inferior courts
where the pro-
ceedings are
similar to those
in the superior
courts, and,
therefore, does
not extend to
the case of a
foreign attach-
ment.

1822.

~~BORROW~~
~~against~~
 MARSHALL.

attachment against *Marshall* for the sum of 150*l*. But he, not being found within the jurisdiction of the city, the writ of certiorari was, in *Easter* term, 1821, obtained, removing the judgment into the Court of King's Bench, in order that execution might issue. The affidavits also stated, that in this case no satisfaction had been acknowledged in the record, and that, by the custom of foreign attachments, a garnishee or a defendant may, at any time before satisfaction acknowledged on the record, put in bail in the ordinary way, to dispute the validity of the plaintiff's debt; and even after the money is paid and satisfaction acknowledged, a defendant has twelve months and a day to bring his *scire facias* ad disprebandum debitum, upon which, if he succeeds, the plaintiff must restore the money received of the garnishee, as a security for which he must, by the custom, give pledges. It was contended, in support of the rule, that the 19 G. 3. c. 70. s. 4. did not extend to this case, the judgment in an attachment not being final, and being subject to three conditions; first, that the plaintiff shall find pledges to restore; secondly, that it may be dissolved by the garnishee or defendant putting in bail before satisfaction acknowledged; and, thirdly, that the defendant may come in and dispute the debt within a year and a day: of all which advantages the parties would, by this proceeding, be deprived.

Bolland shewed cause. The 19 G. 3. c. 70. s. 4. provides, that in all cases where final judgment shall be obtained, in any action or suit in any inferior court of record, the record may be removed. Now, these words are large enough to include the case of a foreign attachment, which is a suit in the Lord Mayor's court. And the

the case is clearly within the mischief; for here the defendant, if he were found within the jurisdiction, could be compelled to pay the money; but, in consequence of his not being so, the plaintiff is deprived of his remedy. It is said, that by this the defendant would be deprived of the advantage of coming in, within a year and a day, to dispute the debt. That is not so; for the money, when levied by virtue of an execution out of this court, will be subject to the same conditions as if levied under process from the court below; and if the defendant comes in and disputes the debt, the record may be then removed back by procedendo for that purpose.

1822.
BUTLER
against
MARSHALL.

Norton, contra, was stopped by the Court.

ABBOTT C. J. This rule must be made absolute. The statute is confined to those suits in which the proceedings of the courts below are similar to those in this court. It speaks, in the preamble to the 4th section, of persons served with process issuing out of inferior courts, where the debt is under 10*l*. But here the party against whom we are to issue execution is not the original debtor; and the form of the execution issued by this Court is quite different from that in the Lord Mayor's court in the case of a foreign attachment. Upon the whole, I am of opinion that this does not come within the statute, and, consequently, that the writ of certiorari in this case was improperly issued.

Rule absolute.

1822.

SATURDAY

JUNE 8th.

Saturday,
June 8th.*Ex parte* WHATTON.

Where a bailiff had written to an attorney for writs, which the latter sent without knowing any thing of the parties or circumstances; but the bailiff never represented himself, or had been considered as an attorney, not looked for any profit upon the law proceedings: Held, that this was not a case within the 22 G. 2. c. 46. s. 11., but, that it was a most improper practice, which the Court, in virtue of its general jurisdiction over attorneys, would punish severely.

A RULE nisi had been obtained, calling upon *J. W. Whatton*, an attorney of this court, to shew cause why he should not be struck off the roll, for having acted as the agent of *John Radford*, a person not qualified to act as an attorney, and for permitting his *Whatton's* name, to be used, upon the account and for the profit of *Radford*, and for sending process to *Radford*, thereby making him to appear to act or practise as an attorney of this court, knowing him not to be qualified. The rule also called upon *J. Radford* to shew cause why he should not be committed to the prison of this court. The 22 G. 2. c. 46. s. 11. recites, that persons not attorneys, do, in conjunction with, and by the contrivance of persons who are attorneys, intrude themselves into and practise in the business of attorneys, &c. &c. and then enacts, "that if an attorney shall act as agent for any person not duly qualified, or permit his name to be made use of upon the account of or for the profit of any unqualified person or persons, thereby to enable him to appear and act as, or practise in any respect as an attorney, knowing him not to be duly qualified, the attorney shall be struck off the roll, and the Court may commit the unqualified person to the prison of the court, for any term not exceeding a year."

This case was heard last term, and the matter was referred to the Master, who now reported the following facts to the Court: *Radford*, who was a bailiff, had, upon several occasions, written to *Whatton*, the attorney, for writs, and the latter accordingly sent such writs, without

without knowing any thing of the parties or the circumstances; but *Radford* never represented himself as an attorney, nor had been considered as such. He was well known to be a bailiff, and his offers to his employers had always been to collect debts for them, and (if necessary to sue for them) to employ an attorney. He never looked for any profit upon the law proceedings, but merely payment for the service of the writ. The attorney had no profit beyond the profit usually charged upon suing out the writ; and this he expected the bailiff to receive for him and account for.

ABBOTT C. J. Upon the facts reported to us by the Master, we are of opinion that this is not a case within the act of parliament, but at the same time we think that this is a most improper practice. It is the duty of an attorney to communicate with his clients, and to give his attention to their concerns. If a bailiff be allowed to obtain writs in the manner stated in this report, the client will be wholly deprived of that attention which he ought to receive from the attorney; and although this case be not within the statute, still the Court, in virtue of its general jurisdiction over attorneys, have the power of restraining this practice; and if repeated they will be disposed to visit it very severely. But, as this is the first time that such a matter has been presented to the consideration of the Court, we do not think it right to order the attorney to be struck off the roll in this instance; but we think the purposes of justice will be sufficiently answered, by ordering that this rule shall be discharged, on payment of the costs by the attorney.

Rule discharged on payment of costs, accordingly.

1928.

Ex parte
WHEATON.

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1822:

Monday,
June 10th.

FARRANT against THOMPSON.

Where certain mill-machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill; and it was afterwards seized under a *fi. fa.* by the sheriff, and sold by him: Held, that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the continuance of the term.

TROVER for mill machinery. At the trial, before *Abbott C. J.*, at the *Middlesex* sittings after *Easter* term, the following appeared to be the facts of the case. On the 10th of *July*, 1820, the plaintiff agreed, by an instrument in writing, to purchase of one *Richards*, for the remainder of a term of 99 years, certain premises at *Cudham*, in *Kent*, on which *Richards* had erected a wind-mill, with the appurtenances, the same having been demised to him for the term of 99 years, at a yearly rent therein mentioned; and the agreement contained a stipulation on the part of the plaintiff, to grant a lease of the premises to *Richards*, for the term of 30 years, at the yearly rent of 80*l.* The plaintiff paid the purchase-money, and *Richards* became his tenant, and paid rent according to agreement. In *September*, 1821, *Richards* offered to sell to the defendant, *Thompson*, part of the machinery of the mill, which he was then about to remove to *Grays*, in *Essex*. A day was fixed for bringing the machinery to *Grays*, and it was then agreed that *Thompson* and his millwright should meet *Richards* at *Grays*, for the purpose of purchasing the machinery. The machinery was severed by the tenant from the mill, and while on the road from *Cudham* to *Grays* was seized in execution by the sheriff under a *fi. fa.* at the suit of a third person, and the defendant afterwards became the purchaser, under the sheriff. It was contended at the trial, that the plaintiff was not entitled to recover, because the purchase by the defendant under the execution was equivalent to a sale in market overt,

and

and that the property was thereby changed, and that the plaintiff ought to have brought his action against the sheriff for wrongfully selling the goods; and, secondly, that as the goods were in possession of the tenant under a demise, trover would not lie for them during the term. The plaintiff obtained a verdict, but the Lord Chief Justice gave leave to the defendant to move to enter a nonsuit, and

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~~FARRANT~~
against
TUCKERSON.

Scarlett now moved accordingly. This action is not maintainable against the defendant. Assuming that *Farrant* might have sued the sheriff or the plaintiff in the execution, still, the defendant being a bona fide purchaser without notice under a fi. fa., is not liable. In *Manning's* case (a) it was resolved that a sale by the sheriff by force of a fi. fa. should stand, although the judgment be afterwards reversed; for the sheriff who made the sale had lawful authority to sell, and by the sale the vendee had an absolute property in the term. In *Doe v. Thorn* (b) it was held, that if a sheriff sell a term under a writ of fi. fa., which is afterwards set aside for irregularity, and the produce of the sale be directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the sheriff. But, secondly, the goods being in possession of the tenant, under a demise, trover was not maintainable. The tenant was entitled to the use of them during the term, and the landlord cannot, therefore, maintain trover; he can maintain no action, except for waste or injury done to the inheritance. In *Gordon v. Harper* (c) the goods leased as furniture were wrongfully taken in execution by the sheriff; and it was

(a) 8 Co. 191.

(b) 1 M. & S. 425.

(c) 7 T. R. 9.

held,

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FARRANT
against
Thompson.

held, that during the term, trover was not maintainable against the sheriff by the landlord, because the latter had not the right of possession. That case is expressly in point.

ABBOTT C. J. I thought at the trial, and still think, that there is a material distinction between this case and that of *Gordon v. Harper*. (a) In that case the goods removed were personal chattels, and the tenant had not by any wrongful act put an end to his qualified possession of them. Here, however, they consisted of machinery annexed to the mill, and formed parcel of the inheritance, and, when wrongfully severed, became the property of the reversioner. As to the other point, the sheriff wrongfully took the goods of the plaintiff, instead of those of the tenant; he could acquire no title by his wrongful act, and could therefore convey no title to the defendant.

BAYLEY J. I am of the same opinion. This case is distinguishable from *Gordon v. Harper* in two particulars; first, there the goods removed were personal chattels, and, at the time of the seizure, continued to be in the qualified possession of the tenant, which the lessor agreed the lessee should have. Here the goods were parcel of the inheritance, and let to the tenant to be used, during the term, in a particular way, viz. in that particular place, and he, by his own act, put an end to that qualified possession. They are not in principle distinguishable from trees, which are parcel of the inheritance; to the use of which the tenant has only a qualified right during his term. If, however, they are

(a) 7 T. R. 9.

separated by his own wrongful act, or the act of God, the tenant has no right to the use during his term, but they become absolutely vested in the person who has the next estate of inheritance. They then become his goods and chattels. Here the removal was intended to be permanent, and the chattels, when severed wrongfully, did not thereby become the property of the wrongdoer, but of the landlord.

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HOLROYD J. I think trover the proper remedy. The machinery was let together with the mill, and was part of the mill. It was a part of the inheritance until the demise was made; when the demise took place, it continued part of the inheritance of the landlord, and part of a chattel real in the hands of the tenant in possession. By the lease or agreement the tenant has the use, not the dominion, of the property demised; and, therefore, when he separated any part of it, to convert it from a chattel real to a chattel personal, his right of using it was at an end for any legal purpose, that right being only to use it in the state in which it was before. In the case of a lease of a house, if a tenant pulls down any part of it wrongfully, and not for the purpose of repair, so as to constitute waste, the person who has the first estate of inheritance has a right to the materials of which that house was before composed; and I apprehend he has a right to an immediate possession of those materials, in the like manner as he has a right to the immediate possession of timber, where it is severed from the inheritance. In that case, when detached, either by the wrongful act of the tenant himself, or by the act of God, it immediately becomes the goods and chattels of the person entitled to the first estate of inheritance, and the right which had been for some time vested in the tenant

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has ceased. I think that the tenant's right was put an end to in this case by the separation of the machinery for an unlawful purpose, which was his own wrongful act; and that, being the goods and chattels of the landlord, as the person who had the first estate of inheritance in the mill, the tenant could have no right to use them as chattels personal, but only while they were part of the chattel real; and, upon the separation, the whole of the property became immediately vested in the landlord.

BEST J. concurred.

Rule refused.

Monday,
 June 10th.

KOOYSTRA *against* **LUCAS** and Others.

By lease granted in 1814, to take effect from 1820, certain houses, together with a piece of ground, which was part of an adjoining yard, were leased to a tenant, together with all ways with the said premises or any part thereof used or enjoyed before. At the time of granting the lease the whole of the yard was in the occupation of one person, who had always used and enjoyed a certain right of way to every part of that yard: Held, that the lessee was entitled to such right of way to the part of the yard demised to him

DECLARATION stated that one *John Heaton* was seised in fee of the premises demised to the plaintiff, and of other premises, called *Sprang's Dairy*, with a certain yard thereto belonging, with the appurtenances situate in the parish of *St. Mary-le-bone*, and being so seised, on the 14th *January*, 1814, by indenture between the said *John Heaton* of the first part, the *Duke of Portland* of the second part, and the plaintiff of the third part, the said *John Heaton* demised to the plaintiff certain ground, messuages, or tenements, and premises in the said indenture more particularly mentioned, comprising, and among other premises, a piece or parcel of ground, then part of the premises called *Sprang's Dairy*, together with all courts, yards, ways, &c. to the said demised premises belonging, or with any part thereof used or enjoyed, habendum to plaintiff for 33 years.

33 years. Declaration then averred, that the plaintiff entered, and that long before and at the time of making the indenture, and whilst the said *John Heaton* was so seised as aforesaid, the occupiers for the time being of the said piece of ground so comprised in the said demised premises, and being part of *Sprang's Dairy*, had been used to have and enjoy a certain way from and out of the same piece or parcel of ground, through a certain shed, being also part of *Sprang's Dairy*, into and over the said yard, thence into, through, and along a passage or gateway, unto and into *Oxford-street*, and so from thence back again, into, through, and along the said passage or gateway, unto, into, through, and over the said yard, unto, into, and through the said shed, into the same piece or parcel of ground, for themselves and their servants, on foot and with cattle and carts, and carriages, to go, return, pass and repass, &c., for the convenient use and occupation of the same piece or parcel of ground; by reason whereof, the plaintiff, as the occupier of the said piece or parcel of ground, was entitled to have, use, and enjoy the said way, &c.; yet the defendants put, placed, and deposited divers large quantities of timber, &c. upon certain parts of the said way, by which plaintiff had been obstructed in the use of the said way. In another count it was stated, that *Heaton* was seised in fee of certain premises called *Sprang's Dairy*, (comprising, amongst other things, the piece or parcel of land demised to the plaintiff,) together with a certain yard thereunto belonging, and being so seised, by indenture made, &c. demised, leased, and set unto the plaintiff, the said last-mentioned piece or parcel of land, amongst other premises, with the appurtenances, together with a certain way for himself, &c. and his assigns, occupiers of the said last-mentioned piece or parcel

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parcel of land, with the appurtenances, and his and their servants, from the said public street, called *Oxford-street*, unto, into, through, and along a certain other gateway, and from thence unto, into, through, over, and along the said last-mentioned yard, and from thence unto, into, and through, a certain other shed or building, part of the said last-mentioned premises, called *Sprang's Dairy*, into the said last-mentioned piece or parcel of land, and so back again from the same piece or parcel of land, through the said last-mentioned shed or building, unto, into, through, over, and along the said last-mentioned gateway, unto and into the said public street called *Oxford-street*, to go, return, pass, and repass on foot and with cattle, carts, and other carriages. Plea, not guilty. At the trial, before *Abbott C. J.*, at the *Middlesex* sittings after last *Easter* term, the following facts appeared in evidence. The way claimed by the plaintiff was, from *Oxford-street*, through a gateway, between the houses No. 71 and 72, on the north side of that street, to a yard behind those houses, in one corner of which, immediately behind the house No. 70, of which the plaintiff was the lessee, he had built a coach-house and stable. By lease of the 14th January, 1814, *John Heaton*, by the appointment of the Duke of *Portland*, demised to the plaintiff a piece or parcel of ground, with the two tenements No. 69 and 70, on the north side of *Oxford-street* thereon, and therein described as abutting north upon *Sprang's Dairy*, in part; and as the same then were in possession of the plaintiff and *Catherine Bagerly*, (the ground plot of the premises being described as particularly delineated in the plan drawn in the margin thereof,) together with all ways, passages, &c. to the said premises belonging or therewith, or with any part thereof, used and enjoyed: *habendum*, from the

6th of July, 1820, (when the old leases would expire,) for 35 years. By the plan in the margin of the lease, the spot of ground upon which the plaintiff had built his coach-house and stables, was described as part of the premises demised under the name of "a cow-shed part of *Sprang's Dairy*." On the 29th of April, 1814, Mr. *Heaton*, by the appointment of the Duke of *Portland*, granted to Messrs. *Hayward*, then of No. 73, *Oxford-street*, a reversionary lease of the rest of the dairy, to commence on the 6th April, 1820, and there was no mention of any right of way having been reserved to the plaintiff. On the 18th March, 1820, *Hayward* granted *Sprang* (who had occupied the dairy for some years) a lease of that part of the dairy demised to them for the whole of their term, wanting five days, and reserved a right of way to the occupiers of No. 71 and 72, down the gateway. *Sprang* afterwards assigned his interest to the defendants. It appeared, that, at the time of the granting the lease in 1814, and for many years before, the yard in question had been in the possession of one person, who, of course, had used the gateway as a way for his horses and cattle to every part of the yard. The obstruction of the way was proved as laid in the declaration. The Lord Chief Justice was of opinion, that the plaintiff was entitled to the right of way claimed for himself and cattle to the spot of ground on which he had built his stable and coach-house, that being a part of the demised premises to which such a way had been used previously to 1814.

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Gurney now moved for a new trial, and contended, that the plaintiff had acquired no such right of way by the terms of the lease in 1814. If the lessor had intended to grant such a right of way as that claimed, it

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would have been expressly mentioned in the lease. Now the premises demised, were described to be in the same condition as they were lately in the possession of the plaintiff and *Catherine Bagerly*. The spot of ground in respect of which the right of way is claimed, was not in the possession of the plaintiff before the new lease took effect, and he had no right of way whatever through the gateway to the back part of his premises in *Sprang's* dairy. There being no express mention of such a right of way, it could not have been the intention of the lessor to grant it.

HOLROYD J. (a) I am of opinion, that by the terms of the lease in 1814, the plaintiff is entitled to a right of way through the gateway, to the piece of ground on which he has since built his stables. That piece of ground formerly constituted a part of the yard called *Sprang's* dairy, and the occupier of that yard, before and at the time of granting the lease in 1814, used the gateway as a way to every part of the yard. By the lease, certain premises delineated in a plan in the margin thereof, comprising a part of *Sprang's* dairy, were demised to the plaintiff, together with all ways thereto belonging or appertaining, or therewith, or *with any part thereof used or enjoyed.*" The way in question, was a way used and enjoyed with a part of the demised premises. It therefore passed to the plaintiff by the very words of the lease. That being so, I think the verdict is right.

BEST J. I am of the same opinion. In order to give effect to all the words of the lease, we must hold

(a) *Bayley J.* had left the Court.

that

that a right of way, which at the time of the granting of the lease, was used with any part of the demised premises passed to the plaintiff. This was a way always used with a part of the premises demised, and therefore passed to the plaintiff.

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against
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Rule refused. (a)

(a) If a man, seised of *Blackacre* and *Whiteacre*, uses a way through *Whiteacre* to *Blackacre*, afterwards grants *Blackacre* with all ways, this way through *Whiteacre* shall pass to the grantee, *Comyns' Dig. tit. Clericus*, D 3. So, if he be seised of two acres to which a way is appurtenant, he grants one acre with all ways, &c., the way shall be granted. See 6 *Modern*, p. 3. *Cro. Jac.* 121, 122. 170.

Lord SONDES against FLETCHER.

Tuesday,
June 11th.

DEBT on a bond, the condition of which was, for the resignation of the rectory of *Kettering*, (to which the defendant had been presented by the plaintiff,) when either of two persons therein named should be capable of taking the same. Breach, that the defendant although requested, refused to resign. At the trial before *Abbott C. J.*, at the *Middlesex* sittings after *Easter* term, it appeared that the defendant was called upon to resign the living, in *October* 1820, and that he refused so to do. The net annual value of the living was 700*l.*, and it was proved at the trial, that the defendant's life-interest, he being 46 years of age, was worth 10 years' purchase. It also appeared, that the life-interest of one of the persons named in the bond, whom the plaintiff intended to present, was worth 14 years' purchase. The jury found a verdict for the latter amount. The Solicitor-General moved for a new trial, on two grounds; 1st, That the true measure of the damages is the amount by which

A bond was conditioned for the resignation of a living, which the defendant when requested had refused to resign: Held, that he being a wrong doer, the jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff by the defendant's life-interest, nor in estimating the annual proceeds to deduct the curate's stipend.

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against
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the plaintiff is prejudiced in the value of the advowson. Now, that is the value of the defendant's life-interest, and in that case the jury have formed the wrong estimate. Besides, in estimating the annual value of the living, it is not sufficient merely to take the gross receipts, for this species of property is subject, and ought to be estimated as subject to the performance of duty, and the defendant ought to have been allowed to deduct the curate's stipend.

Scarlett, for the plaintiff, now repeated an offer which he had made at the trial; viz. that the plaintiff would give up all claim to damages, if the defendant would resign the living.

Per Curiam. We are not prepared to say that the jury in this case have formed a wrong estimate of the damages, for the defendant having entered into a bond to do a particular thing which he has refused to do, is a wrong doer, and he is not to be permitted to estimate the value of the living as if he were the purchaser of it. Besides it appeared at the trial, that the defendant had it in his power to relieve himself from this verdict by resigning the living; and if he does not do that, it is clear that he considers the damages found by the jury as less than the value of the living to him.

Rule refused.

1822.

JONES *against* BIRD and Others.Wednesday,
June 12th.

CASE by the plaintiff, as the owner of the reversion, against the defendants who were employed under the commissioners of sewers for damage done to a house in the parish of *St. Clement, Danes*, in the county of *Middlesex*. The first count of the declaration averred, that the defendants made, altered, repaired, cut, dug, worked and enlarged, certain sewers, gutters and ditches, being and running near unto the said house in which plaintiff was interested, and also near to five other messuages, &c. near to the plaintiff's house, but nearer to the said sewers, &c. (and which five messuages were built close to each other, and one of them adjoining to the plaintiff's house) in so negligent, incautious, unskilful, improvident, and improper a manner, that by means thereof, the said five messuages were thereby undermined, and the walls gave way and fell down, and by means thereof, the walls of the plaintiff's house were damaged and fell down, &c. The second count stated, that the defendants wrongfully and unlawfully altered

By a local act relating to the commissioners of sewers for *Westminster*, it was provided that no plaintiff should recover in any action brought for any thing done in pursuance of the general acts for sewers, or that act, unless notice in writing was given to the defendants specifying the cause of such action. A notice stated that the defendants, who were contractors under the commissioners, made, altered, &c. certain sewers, &c. running under, through, or adjoining, or near to the plaintiff's house, in so negligent, in-

cautious, unskilful, improvident, and improper a manner, that it fell down; and by the declaration and proof given, it appeared that the sewer did not run close to the plaintiff's house, but close to five other houses adjoining thereto, and that the house was damaged, and fell in consequence of the fall of a stack of chimneys of one of those houses, which had been built on the arch of the sewer, and which had been insufficiently shored up by the defendants during the continuance of the work: Held, that this notice sufficiently described the cause of action: Held also, that commissioners of sewers, and persons working by their order, in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such proper precautions for securing them, and to shore them up if necessary, as skilful persons would do, and that they were bound, under the above circumstances, to give specific notice to the owner of the house to which the stack of chimneys belonged, of their construction, and of the danger arising therefrom, and that a general notice to him to take proper means to secure his house was not sufficient.

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against
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and changed the ancient courses and direction of certain ancient sewers, &c. and then alleged the damages as in the first count. The third count stated, that the defendants were employed by certain persons acting as commissioners of sewers, to repair certain common sewers near to the plaintiff's house, and the other five messuages; and that they so carelessly, negligently, unskilfully, and improperly conducted themselves, in making, cutting, digging, enlarging, deepening and repairing the sewers, that the foundation of the five messuages was weakened, and thereby part of them fell down, and the plaintiff's house was injured. The fourth count stated, that the defendants being so employed, &c. cut, sunk, dug, &c. divers sewers, &c. so near to the foundation of the five messuages, as to endanger the same unless they were properly shored up and supported; which defendants neglected to do, and that thereby the damage happened. The defendants pleaded first, the general issue; and secondly, a justification, that the several acts in the declaration mentioned, were done under a commission of sewers of the late king, according to the tenor, purport, and effect of the 29 Hen. 8. c. 5.; thirdly, a similar justification under 3 Jac. 1. c. 14.; fourthly, under 47 G. 3. c. 7.; fifthly, under 23 Hen. 8. and 47 G. 3. c. 7. together; and sixthly, under the 29 Hen. 8., and the several other statutes relative to sewers. Replication, de injuria, &c. and issue thereon. At the trial at the *Middlesex* sittings after *Michaelmas* term, 1821, before *Abbott C. J.*, the plaintiff, pursuant to the local statute 52 G. 3. c. 48., proved a notice to the defendants signed by his attorney, stating that the action was brought, "for that the defendants did by themselves, their servants or workmen, make, alter, cut, dig,

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 against
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dig, work, and enlarge certain sewers, gutters, ditches, and works then being, and running, under, through or adjoining, or near unto a certain messuage or tenement, shop and premises of the plaintiff, situate and being, &c. in the tenure or occupation of *E. H.* his tenant, in so negligent, incautious, unskilful, improvident, and improper a manner, that the said messuage or tenement, shop and premises, or the greater part thereof, fell and were greatly damaged, weakened and destroyed, and rendered unfit and dangerous for use or habitation."

It further appeared by the evidence, that the sewer, which it was necessary to repair, passed close to five houses adjoining that belonging to the plaintiff, and that a stack of chimneys belonging to one of those houses was built upon the arch of the sewer. In the execution of the work it became necessary to rebuild this arch, and in order to support the chimneys in the meantime, a transum and two upright posts were placed under them in order to support them, but without success. The chimneys fell, and in consequence of their fall, the adjoining houses, including the plaintiff's house, fell also. There was contradictory evidence as to the facts, whether in case there had been raking shores placed externally to support the chimneys in addition to the support below them, the accident would have been prevented. The plaintiff's witnesses were of opinion that it would, and those for the defendants, that it would not have been of any use, and that it was impossible to have prevented the fall of the chimneys. There was no specific notice given to the owner of the house to which the chimneys belonged, of their dangerous state, or that it would be necessary for him to take them down. But there was a general notice to the inhabitants to secure

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their houses whilst the sewer was repairing. It also appeared, that there had been a dispute as to the liability to shore up the houses. The defendants and the commissioners of sewers contending, that it was the duty of the owners of the houses to secure themselves, by so doing, and that they were not bound to do it for them. The jury, under the directions of the Lord Chief Justice, were of opinion that the defendants had conducted themselves negligently in doing the work, and accordingly found a verdict for the plaintiff. *Scarlett* in last *Hilary* term obtained a rule nisi for entering a nonsuit, or for a new trial. The former, on the ground that the notice was not sufficient, inasmuch as the injury there stated was one arising immediately to the plaintiff's house from the acts of the defendants; whereas, in the declaration, and by the evidence, it appeared that the injury really complained of, arose from the conduct of the defendants, in not sufficiently shoring up and supporting some other houses, which, by their fall, had damaged that of the plaintiff. This, therefore, was not an immediate but a remote injury. As to the new trial, he contended that the verdict was against the evidence, and that the real question was, whether the defendants had acted *bonâ fide*, and according to the best of their judgment at the time, and not whether after the event had occurred, other persons might think that shoring up or other precautions might possibly have prevented the accident, and that they were not bound to give a specific notice of the danger of the chimneys to the owner of the house.

The Solicitor-General, Gurney, Curwood, and Collyer, shewed cause. The notice is quite sufficient. All that

is required by the act is, that notice in writing shall be given to the defendants twenty-eight days before the action is commenced of such intended action, signed by the attorney for the plaintiff, specifying the cause of such action: and the section further provides, that the plaintiff shall not recover, if sufficient amends shall have been tendered. The object, therefore, was not to give an accurate and minute description of the cause of action, as required in a declaration, but only a substantial notice of the ground of complaint to enable a party to tender amends. Here it states, that defendants worked the sewer in so negligent, incautious, unskilful, and imprudent a manner, that the plaintiff's messuage, or the greater part thereof, fell, and was greatly weakened, damaged, and destroyed. The sewer was the primary support of the plaintiff's house, and the adjoining ones also: and the fall is in fact the immediate consequence of the defendants' negligence. There is no other intervening cause of the accident. The whole fell together in consequence of the defendants' act. That act is, therefore, the immediate cause of the accident to each of the houses. As to the other point: this was a case for the jury, and the weight of evidence is in favour of the verdict. Here it was clearly the duty of the commissioners to have shored up the houses whilst the work was going on. And the evidence is strong to shew, that if that had been done, no accident would have happened. It is now said that it would have been useless. But originally the question was not, whether it was useless, but, whether the commissioners were liable to do it. There is good reason why they should be liable; for they may go into the adjoining houses, if necessary, for the purpose. But private individuals

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 against
 BIRD.

dividuals cannot do so. And they may defray the expense of doing it out of the rates. *Case of the level of Hull. (a)*

Scarlett, Marryat, Littledale, and Andrews, contra.
 The question is not what a person well acquainted with the facts would conclude, from the words of this notice, but what a person wholly unacquainted with them would infer. Such a person would never have supposed, when he read this notice, that the accident had really happened in consequence of a stack of chimneys having fallen at some little distance; and thereby occasioned the fall of the plaintiff's house. He would certainly have concluded that the sewer had run immediately under the plaintiff's house, and that the accident had occurred from a want of due support to it. If a remote cause may thus be given in evidence, under such a notice, where is it to stop? Suppose, many streets off, some accident happens, and produces, remotely, a damage to the plaintiff's house, would that be sufficiently described by such a notice as this? These notices are for the protection of public officers in the discharge of their duty, and should be strictly construed. Here the notice states, that, by the defendants' negligent act, the plaintiff's house was weakened. But that was not so. Another person's house having been improperly built, the chimneys fell, and by their fall the injury happened. Here, therefore, an injury really consequential is stated in the notice as immediate. The notice, therefore, would tend to mislead the defendants. The way of trying the question is, to suppose the de-

(a) 2 Str. 1197.

claration drawn so as to contain only one count, stating what is here stated in the notice. It is clear that then the plaintiff would have been nonsuited, on the ground of a variance. Here, therefore, there is a variance between the notice and the proof. If the notice had stated that the injury occurred from want of shoring up the houses, the defendants might have tendered amends. As to the other question, it may be admitted, that as to the necessity for shoring up the houses there is contradictory evidence. But the proper question is, whether the defendants acted for the best, and bona fide with their best skill. If they did, and there is no contradiction as to that, they are not responsible. It is too much to make them liable because, after the accident has happened, some persons may be found to give their opinion that a different course might possibly have prevented the accident. The whole arose from the improper construction of the stack of chimneys, which rested on the arch of the sewer. And, if nothing had been done by the defendants, the houses would have equally fallen in a short time, from the decay of the sewer. The owner of the house must have known of the construction of the chimneys, and the defendants were not bound to give a specific notice of it. They had given a general notice to all the inhabitants to secure their houses while the sewer was repairing, and that was sufficient. Here the defendants were acting bona fide in the exercise of a public duty, imposed by law; and *Sutton v. Clarke* (a) is an authority to shew, that in such a case an action is not maintainable against them.

1822.

Justice
against
them.

(a) 6 Tenth. 29.

1822.

JONES
against
BRAN.

ABBOTT C. J. I am glad that this matter has been so fully discussed; but I am still of the opinion which I entertained at the trial. I think the notice is sufficient, and that it ought not to be construed with great strictness, its object being merely to inform the defendants substantially of the ground of the complaint, but not of the mode or manner in which the injury has been sustained. That may be, either by their having done an act injurious to the plaintiff, or, as in the present case, by omitting to do an act proper and necessary to be done. It is said that this notice is only applicable to the case of damage arising immediately from the act of the defendants; but I think it is not material or necessary to specify whether the injury be direct or remote. As to the merits, I left it generally to the jury to say, whether there was a want of due care and diligence on the part of the defendants. One question, arising at the trial, was as to the effect which shoring up would have produced, and I stated that the commissioners of sewers and their agents, when repairing sewers in the neighbourhood of houses, were bound to take all proper precaution for their security; and that one question for the jury to consider was, whether shoring up was a proper precaution, and whether it had been omitted. I also told them, that, even if they were of opinion that the stack of chimneys could not by any shoring up whatsoever have been prevented from falling, still that it was the duty of the defendants, if they thought so, to give specific notice of the danger to the owner; and that, if they did not do so, they were responsible. Here no such specific notice of the peculiar construction of the stack of chimneys, and of the danger arising from it, was given. On either of these grounds, therefore, the verdict of the jury is sustainable.

BAYLEY

BAYLEY J. I am of the same opinion; I think the notice was sufficient, and that the case was properly left to the jury, who have come to a right conclusion. A notice of this sort does not require the same precision as a declaration. It is quite sufficient if it calls the attention of the defendants to the general nature of the injury, so that they may go to the premises, and see what the ground of complaint is. If it were otherwise, it would be necessary, in many cases, to have a notice with several counts in it. Here the notice, in substance, states, that the defendants so negligently and improperly worked the sewer, that the plaintiff's house was thereby weakened and gave way. Now the facts are, that the defendants worked under a stack of chimneys, without either properly securing them, or giving notice of their danger to the owner, in order that he might take them down; this was improperly and negligently working the sewer; for if a party does an act which is improper, unless certain previous precautions are taken, he may fairly be said to do that act improperly. But it is said, further, that the notice is incorrect, inasmuch as the act done by the defendant did not produce an immediate effect upon the plaintiff's house. But I think, that as the defendant did work without sufficiently supporting the chimneys, which by their fall, damaged the plaintiff's house, he may fairly be said to have, by his act, damaged the plaintiff's house. The notice, therefore, is sufficient. As to the merits of the case, it is contended, that the defendants are protected, if they acted *bonâ fide* and to the best of their skill and judgment. But that is not enough; they are bound to conduct themselves in a skilful manner; and the question was most properly left to the jury.

1822.

 JONES
 against
 BIRD.

1833,
 Jervis
 against
 Bury.

jury to say, whether the defendants had done all that any skilful person could reasonably be required to do in such a case. The jury were of opinion that they had not, and I think they had abundant grounds for their verdict.

BEST J. (a) The only object of the notice is, to give the defendants an opportunity to tender amends, and it ought not to be scanned very nicely. Its object is at an end the moment the action is brought, and it is only necessary to refer to it, in order to see whether, substantially, the defendant has been informed of the ground of the complaint. It is no ground of nonsuit that there is a variance between the notice and the proof. As to the merits, the question is, whether the defendants had, in working the sewer, conducted themselves with proper skill and care; and the jury thought they had not. In *Sutton v. Clarke* the judgment proceeded, on the ground that there was no pretence for imputing negligence to the defendants. Here the jury have distinctly found the contrary; and here, too, the action is brought against the parties who negligently executed, and not against the party giving the order, as in that case. As to the utility of shoring up, it appears that the commissioners of sewers did not originally contend that it was of no use, but that they were not bound to do it. That, however, was a question for the jury, which was properly left to them, and I think that their verdict was right.

Rule discharged.

(a) *Holroyd J.* was absent at Chambers.

1822.

WILTON *against* GIRDLESTONE.Wednesday,
June 19th.

TROVER for certain deeds. Plea, general issue. At the trial, at the *Middlesex* sittings after *Easter* term before *Abbott C. J.*, it appeared that the bill which was against defendant as an attorney was entitled generally as of *Michaelmas* term, but the memorandum shewed that the bill was filed on the 28th of *November*. It was proved, however, that the bill was actually filed on the 24th of *December*. This evidence was objected to, on the ground that it contradicted the record; but the Lord Chief Justice overruled the objection. The deeds in question were proved to have been placed in the defendant's hands before *Michaelmas* term. But the only evidence of a conversion was a demand and refusal on the 29th of *November* last. The jury having found a verdict for the plaintiff,

A bill against an attorney was filed of *Michaelmas* term, and appeared by the memorandum to have been filed on the 28th *November*: Held, that evidence was admissible to shew that it was actually filed on the 24th *December*: Held also, that a demand and refusal is evidence of a prior conversion, and therefore where deeds were in defendant's possession prior to *Michaelmas* term, and the demand and refusal proved were on the day after that term, it was held that this was evidence of a conversion before the term.

Abraham, by leave, moved to enter a nonsuit, on the ground that the evidence ought not to have been received as it contradicted the record.

Per curiam. *Morris v. Pugh* (a) is an authority to shew that this objection cannot be sustained. A demand and refusal is evidence of a prior conversion; and as the deeds were in the defendant's hands prior to *Michaelmas* term, there was evidence for the jury of a conversion before that period, and they have found the fact to be so.

Rule refused.

(a) 5 *Burr* 1241.

1822.

Wednesday,
July 12th.JACKSON *against* YABSLEY.

Where an action for breach of covenant was pending, and, with all matters in difference, was referred to arbitration, the costs of the suit to abide the event: Held, that an award, that the plaintiff had no demand on the defendant on account of any alleged breach of covenant, or on any other account whatsoever, was final, although the suit was not, in terms, put an end to.

IN this case the plaintiff had commenced an action to recover damages for breaches of covenant, under a lease. The parties were landlord and tenant. The case was referred by agreement, dated 9th March last, to three arbitrators. The award was made by two of them, and dated April the 9th, 1822, and after reciting that differences were existing between the parties, and an action at law pending, and that the suit and all matters in difference had been referred to them, and that the costs of suit, &c. were to abide the event of the award, they awarded that the plaintiff had no claim or demand on the defendant, on account of any alleged breaches of covenant, or otherwise, on any account whatsoever, to the day of the date of the award, and that the defendant had no claim on the plaintiff, in respect of improvements to the estate, or otherwise; a rule nisi having been obtained to set aside the award, on the ground that it was not final.

Russell shewed cause. This is a final award. It is true, that the arbitrators have not, in terms, put an end to the action of covenant; but they have in substance, and that is sufficient. He cited *Hawkins v. Colclough* (a), *Tidd's Practice*, p. 873., *Anonymous*, *Smith's Rep.* 426.

Adam contra, contended, that it was incumbent on the party to put a distinct end to the suit. Here the

(a) 1 Burr. 274.

costs depend on the event of it : and how are they to be taxed ?

1822.

JACKSON
against
YARLEY.

Per Curiam. We are of opinion that the award is final. It is sufficient, if looking at the whole award, it appears that the matter is determined ; and that is the case here.

Rule discharged.

GOODTITLE, on the Demise of the Duke of
NORFOLK, *against* **NOTITLE**.

Wednesday,
June 12th.

READER applied for leave to enter up judgment against the casual ejector. The notice to the tenant in possession at the foot of the declaration in ejectment, was in the name of, and signed by the lessor of the plaintiff. He referred to the 1 G. 4. c. 87. s. 1. by which the landlord, in order to bring the case within that act, is required to address the notice at the foot of the declaration to the tenant in possession.

The notice to the tenant in possession at the foot of the declaration in ejectment, need not be in the name of the plaintiff ; but, if in the name of the lessor of the plaintiff, or even any other person, the Court will permit the rule for judgment against the casual ejector to be drawn up.

The Court held, that the notice was quite regular ; adding, that even if it were signed by a wrong name, the rule might be drawn up.

Rule absolute.

1822.

Wednesday,
June 12th.

RICHARD POWIS & WILLIAM POWIS *against* SMITH.

Where premises had been demised by two tenants in common, and the rent for a time paid to the agent of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and the rent was so paid accordingly, and separate receipts given : Held, that it then became a question of fact for a jury to say, whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of rent to each.

ACTION for use and occupation. Plea, non assumpsit. At the trial, before *Abbott C. J.*, at the sittings after last *Hilary* term, it appeared, that the premises in question, were, in *May*, 1810, demised by both the plaintiffs to the defendant. In 1817 the defendant received notice from the plaintiffs to pay one moiety of the rent to each of them, and from that time the rent was so paid, and separate receipts given. The present action was brought to recover the rent that accrued due from the 25th *December*, 1819, to the 24th *June*, 1821. The Lord Chief Justice thought, upon this evidence, that separate actions ought to have been brought by each of the plaintiffs for his moiety of the rent which accrued subsequently to the alteration in the mode of paying rent, and he nonsuited the plaintiffs. A rule nisi having been obtained for a new trial,

Marryat now shewed cause. There can be no doubt, that if tenants in common join in demising, they may join in receiving the rent. Here, however, they made their election to have a severance of the rent, and each made a demand of his separate moiety; and from that time each must be considered to have made a separate demise of his separate moiety. And if that be so, each must bring a separate action.

Gurney, contra. If separate actions had been brought it would operate as a great hardship on the defendant, for he would then have to pay the costs of two actions instead of one. The original contract of demise was with two; and there has been no new contract. In the case of
Martin

Martin v. Crompton (a), it is laid down, that if there be two tenants in common of a reversion, expectant on a lease for years, upon which a rent is reserved, they may either join in debt, for the rent, or sever; and *Midgley v. Lovelace* (b) is an authority to shew that they may also join in covenant; and in *Littleton*, s. 315., it is laid down, that tenants in common may maintain personal actions jointly; and in s. 316., that if two tenants in common make a lease, rendering to them a rent, the tenants in common shall have an action against the lessee, and not different actions, because the action is in the personalty. The action for use and occupation is substituted in place of the action of debt, and, consequently, the plaintiffs were entitled to bring a joint action, unless the jury found, as a fact, that there was a separate demise by each. He also cited *Co. Litt.* 213. and *Harrison v. Barnaby*. (c)

1822,

Payee
against
Barnaby

ABBOTT C. J. It is clear, that if there be a joint lease by two tenants in common, reserving an entire rent, the two may join in an action brought to recover the same; but if there be a separate reservation to each, then there must be separate actions. Here, by the original contract, there was a letting of the whole premises, by the two tenants in common, at an entire rent; afterwards the rent was severed. It became a question of fact, upon the whole evidence, whether the parties thereby meant to enter into a new contract, with a separate reservation of rent to each, or whether they meant to continue the old reservation of rent, each of the plaintiffs receiving his own moiety. I think that question ought to have been left to the jury. The rule, therefore, for a new trial ought to be made absolute.

(a) 1 *Ld. Raym.* 340.(b) *Cartwright*, 289.(c) 5 *Term Rep.* 246.

1822.

Forsyth
against
Soutten.

BAYLEY J. This was a question for the jury, whether there was a new contract, or only an alteration in the mode of receiving the rent. I should have summed up to the jury, strongly, that it was the latter.

HOLROYD J. The evidence does not seem to me to shew that the contract which was originally joint, was severed by the agreement between the parties. Unless the jury found that fact, the verdict cannot be supported.

BEST J. concurred.

Rule absolute.

Friday,
June 14th.

SOUTTEN *against* SOUTTEN.

Where a surety, in a warrant of attorney, in order to discharge himself from his personal liability, paid part of the debt due to the creditor of a bankrupt, who had proved under the commission, and thereupon satisfaction was entered on the record: Held, that this did not fall within 49 G. 3. c. 121. s. 8., as being a payment of part of a debt in discharge of the whole, and that consequently the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him.

ASSUMPSIT for money paid, &c. Plea, general issue. The action was commenced in *Hilary* vacation, 1821, and issue was joined in *Trinity* term following, and the cause set down for the second sittings in that term. The notice of trial having been countermanded, the cause was again set down for trial at the first sittings in *Michaelmas* term, and was ultimately made a remanet to the adjourned sittings after that term. On the 17th *July*, 1821, the defendant obtained his certificate, under a commission of bankruptcy, dated *March* 9th, 1818. It appeared that the action was brought to recover the sum of 500*l.*, paid by the plaintiff for the defendant, as surety to one *Richard Bodfield*, in a warrant of attorney, dated 3d *April*, 1816, for payment of 1970*l.* and interest, by instalments, with a stipulation, that, in case of any one default, the whole should be immediately payable, and execution should

issue

issue thereon for the whole. Judgment was signed on this warrant of attorney, *April* 5th, 1816. At the time when the commission issued, there remained due on the warrant of attorney 1337*l.* 15*s.*; and shortly after, another instalment becoming due, default was made. On the 14th of *March*, 1818, *Bodfield* proved the debt under the commission; and on the 25th of *March*, 1818, the plaintiff and *Bodfield* agreed that the former should pay 500*l.* in discharge of his personal liability as surety, which was done, and satisfaction was entered on the record as of *Michaelmas* term, 1818. The roll of the judgment was, however, only carried in and satisfaction entered on the record subsequently to the sittings after last *Michaelmas* term, and shortly before the adjourned sittings, when the cause was tried. At the trial, after the office copy of the judgment roll had been given in evidence, a plea of the defendant's certificate puis darrein continuance was offered by the Solicitor-General. The Lord Chief Justice was of opinion, that as the whole of *Michaelmas* term had elapsed, during which the defendant might have pleaded it in bank, he was now too late, and refused to receive the plea. The plaintiff accordingly had a verdict. The Solicitor-General, in last *Hilary* term, obtained a rule nisi for a new trial, with libery for the defendant to plead his certificate puis darrein continuance nunc pro tunc as of *Michaelmas* term.

Marryat and *Espinasse* shewed cause. Here the defendant was too late; for he obtained the certificate in the vacation after *Trinity* term; and therefore he might, at any time during the whole of *Michaelmas* term, have put in this plea. Besides, the plea, if put in, cannot

1822.

Secret
against
Society.

1822.

~~Source~~
Source
Against
Sovereign

avail the defendant; for this payment does not fall within 49 G. 3. c. 121. s. 8., not being a payment of the debt, nor of a part in discharge of the whole debt. Here the plaintiff, by this payment, could not prove himself, or have the benefit of the creditor's proof, under the commission. The case, therefore, is not within the act of parliament.

The Solicitor-General and Chitty, contra. Here the defendant could not have pleaded his certificate in bar during *Michaelmas* term; for at that time satisfaction was not entered on the roll. The roll was carried in after the term, and then the situation of the defendant was altered. For, by the entry of satisfaction on the record, the sum became a payment of part of the debt in discharge of the whole, and then it falls within 49 G. 3. c. 121. s. 8.

Per Curiam. If we are to give the defendant leave to plead his certificate *puis darrein continuance*, we ought, at least, to be satisfied that, when pleaded, it will be a bar to the action. But we are of opinion that it would not be so. The 49 G. 3. c. 121. s. 8. only applies to cases where a surety has paid the whole debt, or a part in discharge of the whole. In those cases, the creditor has no further claim under the commission, and the surety is then placed in the creditor's original situation with respect to the bankrupt. Here that is not the case. The original creditor has proved under the commission, and the present plaintiff has released himself by this payment from his personal liability as surety. Here, therefore, he cannot derive any benefit under the commission; and the legislature could never have intended,

tended, under such circumstances, to take away the right of action which he previously possessed.

1822.

Rule discharged.

SOUTHERN
against
SOUTHERN.

CARTER and Another *against* TOUSSAINT.

Friday,
June 14th.

ASSUMPSIT for the price of a horse, with the usual money counts. Plea, general issue. At the trial, at the *Middlesex* sittings after last *Hilary* term, before *Abbott C. J.*, it appeared that the plaintiffs, who were farriers, sold to the defendant a race horse, by a verbal contract, for 30*l.* The horse, at the time of the sale, required to be fired, which was done with the approbation of the defendant and in his presence; and it was agreed that the horse should be kept by the plaintiffs for twenty days, without any charge being made for it. At the expiration of the twenty days the horse was, by the defendant's directions, taken by a servant of the plaintiffs' to *Kilmington Park*, for the purpose of being turned out to grass there. It was there entered in the name of one of the plaintiffs, which was also done by the directions of the defendant, who was anxious that it might not be known that he kept a race-horse. No time was specified in the bargain for the payment of the price. The defendant afterwards refused to take the horse. The jury, under the direction of the Lord Chief Justice, found a verdict for the plaintiffs. *Scarlett*, in last *Easter* term, obtained a rule nisi for entering a nonsuit, on the ground reserved at the trial, that there was not a sufficient acceptance by the defendant to take the case out of the 17th section of the statute of frauds.

A horse was sold by verbal contract, but no time was fixed for the payment of the price. The horse was to remain with the vendors for 20 days without any charge to the vendee. At the expiration of that time the horse was sent to grass, by the direction of the vendee, and by his desire entered as the horse of one of the vendors: Held, that there was no acceptance of the horse by the vendee within 29 Car. 2. c. 4. s. 17.

1822.

CARTER
against
TOUSSAINT.

Marryat and *Hawkins* shewed cause. The case is not within the 17th section of the statute of frauds; for here there was a complete delivery, and acceptance by the defendant. If a buyer orders goods to be sent to a particular wharf, and they are there delivered, the acceptance by the wharfinger is clearly sufficient to take the case out of the statute. Here, by the defendant's order, the horse was sent to *Kimpton Park*. And this is, therefore, a stronger case of acceptance than *Elmore v. Stone* (a), where the removal was from one stable to another. *Hanson v. Armitage* (b) will be cited on the other side. There, however, there was no special direction as to the place where the goods were to be sent. Besides, that case is at variance with *Hart v. Saltley* (c), where *Chambre J.* held, that the master of the ship must be considered as the vendee's agent to receive the goods, in a case where they were shipped according to the usual course of dealing between the parties. But it is said that the horse was entered at *Kimpton Park* in the name of one of the plaintiffs. That, however, being done by the request of the defendant, can make no difference. It is admitted, that if there be an acceptance, though but for a minute, it is sufficient. Here, the delivery of the horse to the person who conveyed him from the plaintiff's house to the park, was sufficient; for that person must be considered as the defendant's servant. Besides, the horse was hired for the use of the defendant, and must be considered as having remained in the hands of the plaintiffs for the purpose of cure; and then the case falls precisely within the principle of *Elmore v. Stone*.

(a) 1 Taunt. 458.

(b) *Ante*, 557.

(c) 3 Campb. 528.

Scarlett and Laves, contra. If this question were now for the first time to be determined, no doubt could be entertained by any one who looked at the words of the statute. It is not requisite indeed, that to constitute an acceptance, the goods should be in the manual possession of the vendee. But he must at least have the complete controul before he can be considered as having accepted them. If the key of the warehouse where they are deposited is delivered to him, or an order for delivery to him is signed in the wharfinger's books, in these and the like instances it may fairly amount, if he assents, to an acceptance on his part. For there, he on the one hand has the complete controul without any lien on the part of the vendors; and on the other hand, he cannot after that be allowed to object to their quality, &c. But if that criterion be applied to this case, it will determine it in favour of the defendant. For here, he had no controul over the horse. He could not have compelled the park keeper to have delivered it to him. Here too, there was no time fixed for the payment of the price, and therefore, the vendors would not have been bound to part with the horse till the price was paid. This, therefore, falls within the cases of *Hanson v. Armitage* (a), and *Tempest v. Fitzgerald* (b). *Elmore v. Stone* is a case of doubtful authority, but at all events, it is not precisely in point with this. There, the Court considered the vendor as having by his own act become the agent of the vendee, and having thereby lost his lien for the price of the horse. But here the party has not lost that lien. Suppose *Carter* had become bankrupt, it is clear that the horse would have gone to his as-

1822.

CARTER
against
TOUSSAINT.

(a) *Ante*, 557.

(b) 3 B. & A. 680.

signees,

1822.

CARTER
against
TOUSSAINT.

signees, as being in his possession at the time of the bankruptcy. That consequence would not have followed in *Elmore v. Stone*. Suppose the horse had been damaged in going to the park, could not the defendant have objected to receive him? If he could, then according to the principle laid down in *Howe v. Palmer* (a), there is no sufficient acceptance. As to the firing, it was not done specially for the defendant, but generally for any one to whom the horse might afterwards be sold. This case, therefore, falls within the statute of frauds, and the defendant is entitled to the judgment of the Court.

ABBOTT C. J. In this case, it appears there was a verbal bargain for the horse at 30*l.*, for the payment of which no time was fixed. The seller, therefore, was not compellable to deliver it until the price was paid. In *Elmore v. Stone*, there was a contract of a similar description, but the Court thought that the circumstance of the change of the stable altered the character in which the plaintiff there held possession of the horse. For, the plaintiff thereby consenting to have the horse placed in the livery stable, ceased to keep possession as owner; and held it only in his capacity of livery stable keeper. There is no circumstance of that description in the present case. It is quite clear, that the present plaintiffs kept possession of the horse as owners until it was sent to *Kimpton Park*. If, indeed, it had been sent there and entered in the defendant's name by his directions, I should have thought it would have amounted to an acceptance by him. But here it was entered in the plain-

(a) 3 B. & A. 521.

tiffs' name, and the plaintiffs' character of owner remained unchanged from first to last, and they could not have been compelled to deliver it without the payment of the money. There was then no sufficient acceptance to take the case out of the statute of frauds; and consequently the action is not maintainable.

1829.

CARTER
against
TOUBAINT.

BAYLEY J. The statute of frauds is a remedial law, and we ought not to endeavour to strain the words in order to take a particular case out of the statute. By the 17th section it is provided, that in the case of a sale of goods above the value of 10*l.*, the buyer must accept, and actually receive part of the goods so sold. There can be no acceptance or actual receipt by the buyer, unless there be a change of possession, and unless the seller divests himself of the possession of the goods, though but for a moment, the property remains in him. Here, the plaintiffs had a lien on the horse, and were not compellable to part with the possession till the price was paid. Then the question is, was there any thing to deprive them of that right? It is said that the horse was fired, but after that he still remained in their possession; then he was sent under the care of their servant to *Kimpton Park*. But that was no act of delivery to dispossess them of the horse. At *Kimpton park*, he was entered in the name of one of the plaintiffs, and they still therefore retained a controul over him. How can it be said that the horse was in the possession of the defendant, when he had no right to compel a delivery to him. For he could not, on tendering the keep, maintain trover against the park keeper, because the possession had not passed from the vendors to him. The case of *Elmore v. Stone* is distinguishable.

There

1822.

CARTER
against
TOUSHAINT.

There the original owner of the horse had stables in which he kept horses as owner, and others, where he kept them as livery stable keeper; and the Court considered, that by changing the horse from the one to the other, he had divested himself of the possession and given up his lien. But there is no circumstance of that sort here.

HOLROYD J. I am of the same opinion. The facts here stated do not amount to an acceptance or actual receipt of the horse, which must be considered as having continued throughout in the plaintiffs' possession. The case would be different if the horse had been entered at the park in the name of the defendant, but being entered in the name of one of the plaintiffs, they retained a controul over it, and the park keeper was their agent. This case is distinguishable from *Elmore v. Stone*; there there was a change of possession, here there is not.

Rule absolute.

1822.

EASUM and Others, Assignees of DOWSLAND
and Another, Bankrupts, against CATO.

Tuesday,
June 18th.

ASSUMPSIT for money had and received, and the usual money counts. Plea, general issue. At the trial, at the *Guildhall* sittings after last *Hilary* term, before *Abbott C. J.*, a verdict, under the directions of the Lord Chief Justice, was found for the defendant. The following were the facts of the case: *Dowsland* and *Davison*, the bankrupts, were ship and insurance brokers in *London*, and the defendant, *Cato*, was a clerk in a bank at *Lichfield*. In *December*, 1818, the bankrupts, who were then indebted to the defendant in a large amount, were desirous to make shipments of goods on their own account and risk, to *Rio de Janeiro*. They accordingly purchased goods to the amount of 8000*l.*, in their own names, but with a view of shipping the same through the house of Messrs. *I. and W. March*, in the name of the defendant. It appeared, from a letter dated 17th *December*, 1818, from the bankrupts to the defendant, and his answer thereto, that the shipment was on the account and risk, solely, of the bankrupts, and that the defendant had no interest in it. The bankrupts, however, represented to Messrs. *I. and W. March*, that the goods belonged to, and were shipped on the account of the defendant. The goods were accordingly shipped, and the defendant, by the desire of

Where *J. S.* being desirous of making a shipment for his own risk and advantage, but not in his own name, represented to the merchants, through whom the shipment was to be made, that the goods were the property of *A.*, and shipped on his account, and *A.* accordingly, by the desire of *J. S.*, wrote to those merchants, stating the party to be so, and directing them to insure, and to advance money to *J. S.* on the goods, which was done: Held, that this was a credit given to *A.* by *J. S.* by the delivery of goods in its nature likely to terminate in a debt, and that, therefore, *J. S.* having subsequently become bankrupt, *A.* was entitled to recover the proceeds of the shipment from the merchants, and to set off against them a debt due from the bankrupt to him, it being a case of mutual credit within 5 G. 2. c. 30. s. 28.

the

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the bankrupts, copied and sent a letter to Messrs. *I. and W. March*, dated 1st *January*, 1819, as follows: "Gentlemen, I have shipped on board the *Friendship*, Captain *Dawson*, for *Rio de Janeiro*, about ten tons of wrought copper, consigned to your house there for sale, the invoice cost of which will be about 2000*l.*, and I have to request you to advance to my friends, Messrs. *Dowland* and *Davison*, on account of this shipment, 1000*l.*, or thereabouts, upon their handing you bills of lading: I have further to request, that you will insure 2000*l.* on these goods for my account, and with respect to the disposal of them; Messrs. *Dowland* and *Davison* will make the necessary communications on the subject, previous to the departure of the ship." Messrs. *I. and W. March* accordingly advanced to the extent of 800*l.*, and such advance was made by them on the credit of the shipment made through their house. At the time the defendant copied and sent the letter, he did not know from whom the bankrupts had purchased the goods. The bills of lading stated that the goods were shipped by *I. and W. March* and Co. for *Rio de Janeiro*, and to be delivered to *March*, brothers, and Co., or to their assigns, freight for the said goods to be paid in *London*, with primage and average accustomed. The invoices were furnished by *Dowland* and *Davison*, and signed by them; they were headed thus: "Invoice of 35 cases, &c. shipped on board the *Friendship*, *William Dawson* master, and consigned to Messrs. *March*, brothers there, for sale, on our account and risk, as agents." The insurance on the goods, &c. shipped, was effected by Messrs. *I. and W. March* in their own name. From the 1st *January* to the 14th of *June*, 1819, the defendant, at the instance of *Dowland*, made very considerable

siderable advances in cash and bills to *Dowland* and *Davison*, making a balance due to the defendant, of 1196*l.* 10*s.* 1*d.* on the 14th *June*. *Dowland* and *Davison* became insolvent in *July*, 1819, and committed acts of bankruptcy about the 19th *March*, 1820, and a commission issued against them, dated the 19th *May*, 1820, under which the plaintiffs were chosen assignees. After their insolvency, the house of *March*, brothers, and Co., of *Rio Janeiro*, forwarded to the house of *I. and W. March* and Co., *London*, the accounts sales of the copper consigned to them, with three letters addressed to the defendant, dated 27th *September*, 1819, and 19th *April*, and 6th *May*, 1820. This was the only correspondence which the defendant had with them, but it is not usual for persons making consignments through *London* houses, to correspond with the houses abroad, who know only the house through which the consignments are made. On the 29th *July*, 1820, the assignees, through their solicitors, wrote letters to Messrs. *I. and W. March* and Co., claiming the property in question, and requiring them not to account to any persons but themselves for the same. After the issuing of the commission of bankruptcy the returns for the shipment so made to the house of *March*, brothers, amounting to 247*l.* 19*s.* 11*d.*, came home to the house of *I. and W. March* and Co., who, in *December*, 1820, paid to the defendant the sum of 10*l.* in part of such proceeds. This payment was made to the defendant before this action was brought, and after notice given of the bankruptcy, and of the claim made by the assignees. At the time of the bankruptcy *Dowland* and *Davison* were indebted to the defendant in the sum of 3102*l.* 18*s.* 8*d.* for monies paid and advanced by the defendant, and for liabilities

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liabilities which the defendant had entered into for them previously to their stopping payment. The jury found as a fact that the bankrupts intended to give the defendant a lien on the shipments for the money previously advanced by him. (a) *Marryat*, in last *Easter* term, obtained a rule nisi for a new trial, on the ground that this was a verdict against evidence, and as to that he relied on the letter of the 17th *December*, 1818, as decisive to shew, that the only object the bankrupts had was to conceal their interest in the transaction, which was not a proper one for them, as brokers, to undertake. The Court, in granting the rule, directed the question to be argued, whether, independently of that finding, the verdict was not right, it being a case of mutual credit within 5 G. 2. c. 30. s. 28.

Scarlett and *Campbell* shewed cause. They contended, that, whether or not the special finding of the jury could be supported, this was clearly a case of mutual credit between the bankrupts and the defendant, within 5 G. 2. c. 30. s. 28., by which the commissioners are to settle the account between the parties, and the balance due is to be claimed or paid. Here the bankrupts represented the defendant as the owner of the goods to the merchants through whom the consignment was to be made, and thereby gave him an authority, which being coupled with an interest was not countermandable by them, to receive the proceeds. It is quite clear that the defendant, if he had received these proceeds before the

(a) There was another shipment through Messrs. *Warre*, brothers, to which the action equally applied. But as the two were in all essential particulars exactly similar, we have thought that our report would be simplified by omitting the facts relative to that transaction.

bankruptcy,

bankruptcy, could have set them off against the debt due from them to him. And what is the difference? Here it was a credit, given by the delivery of the goods, in its nature likely to terminate in a debt; and that is the criterion laid down by Gibbs C. J. in *Rose v. Hart*. (a) This case falls, therefore, within the principle laid down in *Olive v. Smith* (b), and *French v. Fenn*. (c)

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Marryat, *Puller*, and *Maule*, contra, contended, that this was not within the statute. Here the bankrupts could have compelled the house of *March* and Co. to account for the proceeds to them. For the defendant was not at all interested in the gain or loss arising from the transaction. There is no instance to be cited in which it has been determined to be a case of mutual credit, unless where the goods have been delivered to and are in the possession of the party himself. That was the case in *Olive v. Smith* and *French v. Fenn*, which are, therefore, distinguishable from the present case. In *Sampson v. Burton* (d), where they were in the hands of a third person, it was held not to be within the statute. As to the finding by the jury, there is clearly no evidence to support it.

ABBOTT C. J. My opinion, in this case, is not founded upon the intention found by the jury, but on the ground that the facts here establish a case of mutual credit. It appears that the bankrupts, being desirous of making consignments to *Rio de Janeiro*, and not choosing

(a) 2 Bay. M. 547. (b) 5 Taunt. 56. (c) Cooke's B. L. 7th ed. 536.

(d) 2 Brod. & B. 89. 4 B. Moore, 515.

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to be known in the transaction, represented to *L* and *W. March*, that the goods shipped by them belonged to the defendant, and were to be shipped on his account, and that they procured the defendant to write letters to *L* and *W. March*, directing advances to be made upon the goods, which was accordingly done; and that house took upon themselves the management of the concern. In the invoice and bill of lading the goods were not described as the goods of the bankrupts. Now, if all the parties had continued solvent, it is clear that, according to the usual course of trade, the proceeds of these goods would not have been paid over to the bankrupts, but to the defendant. It seems to me, therefore, that this case is to be considered as if the bankrupts had actually put the goods into the hands of the defendant; and then, no doubt, it would have been a case of mutual credit within the statute 5 G. 2. c. 30. s. 28., and he would then have been entitled, in the event which has happened, to set off against the proceeds the debt due from the bankrupts to him. I think, therefore, that the verdict is right, and that the defendant is entitled to our judgment.

BAYLEY J. I am not sure whether any case in the books goes the full length of this; but, I think that this is a case of mutual credit within the statute 5 G. 2. c. 30. s. 28., which is now held to be confined to such credits as must in their nature terminate in debts. That, as it seems to me, is the case here. The bankrupts apply to the defendant to permit his name to be used in these consignments, and he writes letters, requesting advances to be made. Now this
 seems

seems to me, to amount to a consent by the bankrupts, that the defendant shall be considered by *I. and W. March* as the owner of the goods consigned. And one consequence resulting from that would be, that the defendant would have the right to require from *I. and W. March*, an account of the proceeds and the payment of the balance due. It amounts, therefore, to a consent by the bankrupts, that the money produced by the consignments should pass through the defendant's hands. In that case, he would have a right to deduct from it the debt due to him. And that might be the ground for his permitting the bankrupts to be, and to remain in his debt. It is said in argument, that the bankrupts could have compelled *I. and W. March* to account for the proceeds with them. But that is a *petitio principii*. For they could not do so, if the defendant had a right to receive and to stop the money in transitu; for such a right would be a beneficial interest in him, and the bankrupts could not, therefore, countermand his authority to receive the money. I think, therefore, that this was a case of mutual credit, likely to terminate ultimately in a pecuniary balance on the one side or the other. It is, therefore, within 5 G. 2. c. 20. s. 28., and the defendant is entitled to our judgment.

HOLROYD J. I am of opinion that this is a case of mutual credit, and therefore, that independently of the intent found by the jury, the verdict is right. The case lies within a narrow compass. The defendant does not lend his name generally to the bankrupts, but only for a particular transaction. The goods were to be sent in the defendant's name by *I. and W. March* to *Rio de Janeiro*, and the proceeds were to be remitted to them as his

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agents. Under these circumstances, and knowing this, the defendant subsequently made advances to the bankrupts, which probably were made on the ground, that those proceeds were in the hands of persons who were accountable to him. It is true, that the defendant directed the bankrupts to be consulted as to the disposal of the goods, and if no bankruptcy had happened, they would have had the disposal of them. These directions, however, were revocable by the defendant. I am clearly of opinion, that the parties having agreed, that these goods should be represented as belonging to the defendant, and he having advanced money in consequence, it is a case of mutual credit within the statute.

BEST J. I am of the same opinion. The goods in this case were, as it seems to me, as much under the defendant's controul as if they had been sent to his warehouse. Messrs. *I. and W. March* must, from the facts stated, have considered him as the principal in the adventure. All directions relative to it were in his name, and the bankrupts were represented throughout merely as his agents, and as having no powers except what they derived from him. The application was not for an advance to the bankrupts, but through the bankrupts to the defendant. That is a strong circumstance to shew that the property was not to be dealt with without the defendant's consent, and that the proceeds were to be under his controul. In *Ex parte Deeze* (a), Lord *Hardwicke* is reported to have put it as a case of mutual credit, if a man had goods in his hands be-

(a) 1 Atk. 228.

longing

longing to a debtor of his, which could not be got from him without an action at law or a bill in equity. Now that is the case here; for these goods could not have been given up to the bankrupts against the consent of the defendant, except by some proceedings of that nature. This, therefore, is a case of mutual credit, and the defendant is entitled to our judgment.

Rule discharged.

WELLS *against* GREENHILL.

DECLARATION against the defendant, as the maker of several promissory notes, bearing date in *September*, 1818, and *May*, 1819. Plea, non-assumpsit. At the trial, before *Abbott C. J.*, at the *Middlesex* sittings after last *Michaelmas* term, the only question was, whether the defendant was discharged from the plaintiff's claim by the provisions of a composition-deed. It appeared that, by lease and release, of the 12th and 13th *October*, 1819, made between the defendant of the one part, and certain trustees named therein of the other part, the defendant conveyed all

By a composition-deed reciting that the insolvent was indebted in certain sums to *J. P.* for rent, to the crown for duties, to *A.* and *B.* upon judgment, and to the other creditors in the sums of money set opposite their names in the schedule, the insolvent bargained and sold to trustees all his leasehold messuages, subject to certain

mortgages, and all his personal estate whatsoever, upon trust to carry on the brewing and malting business for the benefit of the creditors, and to collect outstanding debts, and to sell the farming stock, and out of the monies arising from the sale of any part of the estate that should be mortgaged, to satisfy the mortgage, and to stand possessed of the residue upon trust to pay *J. P.* the rent due to him, the duties due to the crown, the rent which was, or thereafter should become due for any of the premises assigned, the interest upon the mortgages, then the judgment debt due to *A.* and *B.*, then to pay all the creditors whose debts did not amount to 10*l.* in full, and at the expiration of nine months to pay all the other creditors the amount of 5*s.* in the pound. There was a covenant by the creditors that they would release their respective claims to the insolvent. The indenture contained a proviso, that in case any creditor whose debt should amount to 100*l.*, or any two creditors whose debts should amount to 150*l.* should not execute within three calendar months, the deed should be void. *A.* and *B.*, the judgment creditors, whose debt exceeded 150*l.*, did not execute the deed within the time required: Held, that the deed was not thereby rendered void, the intention manifestly being that those creditors only who were to receive a composition under the deed, were to execute it.

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Wills
against
Osterhill.

his freehold property, and covenanted to surrender all his copyhold hereditaments, subject to the mortgages affecting the same, unto the trustees, their heirs and assigns, upon trust, to sell the same, and to stand possessed of the money to arise therefrom, upon trust, to pay the costs of the sale and the mortgages affecting the premises, and to pay the residue thereof as the defendant should direct. By indenture of the 13th October, 1819, between the defendant of the first part, the said trustees of the second part, and the several persons whose names and seals were subscribed and affixed, creditors, of the third part, reciting, that the defendant was indebted to *W. S. Poyntz* in 153*l.* for rent: to the crown, in 413*l.* for duties: to Messrs. *Stoveld* and *Upperton* in 400*l.* upon a bond and judgment: and to *W. Dennett*, *R. Wardropper*, *J. Stunnington*, and the parties thereto, of the third part, in the sums of money set opposite to their names in the schedule thereto; and that, being desirous to make provision for the payment of all his debts, he had agreed, with the consent of the parties thereto, to convey, surrender, and assign, all his real and personal estate and effects unto the trustees, upon the trusts, and subject to the provisos thereafter mentioned; and also, reciting the indenture of lease and release, it was witnessed, that, for effectuating the purposes aforesaid, in consideration of the covenant on the part of the creditors, and for the nominal consideration of 10*s.*, the defendant bargained and sold unto the trustees all his leasehold messuages, subject to the mortgages affecting the same, and all his stock in trade, &c., book and other debts, farming stock, and all his personal estate whatsoever, upon trust for eighteen months to carry on the brewing and malting business for the benefit

benefit of the creditors, to collect outstanding debts, and to sell the farming stock and all other effects of the defendant, and out of the monies arising from the sale of any part thereof as should be mortgaged, to pay and satisfy the mortgagees, and to stand possessed of the residue of the monies, upon trust to pay the costs of the trust-deeds, then to pay *Poyntz* the rent due to him, the duties due to the crown, the rent which then was or thereafter should become due for any of the premises assigned, the interest which then was or thereafter should become due upon the mortgages, then to pay the debt due to *Stopeld* and *Upperton* upon their bond and judgment, with interest; then to pay in full all the creditors whose debts did not amount to 10*l.*; then, at the expiration of nine months, to pay all the other creditors named in the schedule the amount of 5*s.* in the pound on their respective debts, without preference or priority; and after the expiration of eighteen months, the period of management of the brewing and malting business, or as soon as conveniently might be, to convert all the remaining trust-estate, and get in all the remaining debts, to pay all debts and expences of the trust, and all incumbrances, and to stand possessed of the residue upon trust, to apply the same towards the full discharge of so much of the debts of the creditors named in the schedule as should be then remaining unpaid, rateably and without any preference; and, lastly, to pay the surplus (if any) of the trust estate to the defendant. There then followed a covenant, by the creditors who executed the deed, that if the indenture did not become void by virtue of the proviso therein contained, the respective creditors would, at any time after the determination of the eighteen months, release to the

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against
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against
Garnett.

defendants all actions, claims, and demands whatsoever on his estate for or on account of any debts due or owing by the defendant, or for any other matter or thing whatsoever, and that *they would not in the mean time commence any action against him.* The indenture then contained a proviso, that in case any creditor, whose debt should amount to 100*l.* or upwards, or any two creditors whose debts should amount to 150*l.* or upwards, should not execute the indenture within three calendar months, that the deed should be void. The schedule at the foot of the deed contained a list of the persons who were creditors on the 13th *October*, 1819, and the amount of their respective debts, and the name of the plaintiff was inserted therein for 226*l.* The indentures of lease and release, and of assignment, were duly executed by the defendant and the trustees; and the assignment was also executed by the plaintiff, *Wells*, and all the other creditors named in the schedule, within three calendar months; except *Stoveld* and *Upperton*, creditors for 400*l.* upon the bond and judgment; *J. H.* and *J. T.*, creditors for rent; and *G. M.*, a creditor for 20*l.* for interest of mortgage money. By the trusts of the deed, these several parties were entitled to be paid in full. The trustees took possession of the estate of the defendant under the deed, and sold part, and have received the rents and profits, and collected the debts due to the defendant, and have applied the money arising from the sale of the mortgaged estates, in discharge of the principal and interest of the mortgages; and they also, during 18 months, carried on the brewing and malting business, and paid the excise duties, rent, taxes, and other outgoings, and the interest of the mortgages, the 400*l.* due to *Stoveld* and *Upperton*, and the debts of such

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 WILLS
 against
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such of the creditors as did not amount to 10*l*., but in consequence of a deficiency of the assets, they had not been able to pay the other creditors any dividend on account of their debt. It was contended at the trial on the part of the plaintiff, that the deed was void because *Stoveld* and *Upperton* had not executed it. The Lord Chief Justice, however, was of opinion, that that was not necessary, and the plaintiff was nonsuited, but leave was reserved to move to enter a verdict for the plaintiff, if the Court should be of opinion that the deed was void in consequence of its not having been executed by *Stoveld* and *Upperton*. A rule nisi having been obtained accordingly.

Marryat and *Courthope* now shewed cause. The proviso does not extend to those creditors, whose debts by the terms of the deed were to be paid in full. If it did, it would follow that the deed should have been executed by somebody on the part of the crown and by the mortgagees. The object of the deed was, to enable the trustees to raise funds by carrying on the trade for 18 months, and thereby to pay the debts in whole or in part of those creditors, who, at the time of executing the deed had no means of compelling instant payment. The debt of the crown at that time might have been levied by an extent, the rent might have been levied by distress, and the debt of the judgment creditor by instant execution. By the provisions of the deed, therefore, those creditors were to be paid in the first instance, and they might have been paid within three months after the date of the deed, and if *Stoveld* and *Upperton* had been paid their debt within three months, it certainly could not have been necessary for them to become parties

to

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Words
against
Guarantee.

to a deed, from which they could derive no benefit whatever.

Gurney and Curwood, contra. The words of the proviso are, "that if any creditor whose debt amounts to 100*l.*, or any two creditors whose debts amount to 150*l.* should not execute the deed within three calendar months, it should be void." Now *Stoveld* and *Upperton* were creditors for 400*l.*, and did not execute the deed within the time required, they therefore come within the very words of the proviso, and consequently the deed is void. [*Bayley J.* A mortgagee whose debt exceeds 200*l.* is a creditor within the words of the proviso, but surely it was not necessary for him to execute the deed?] A mortgagee could derive no benefit from the deed, because by the terms of the mortgage deed, there probably was reserved to him a power of sale upon non-payment of the principal and interest. He therefore had it in his power to compel payment, but *Stoveld* and *Upperton*, who were judgment-creditors, might derive some advantage from the trade being carried on for 18 months, for during that time funds might be acquired sufficient to satisfy their debt, and possibly at the time of executing the deed, there might not have been sufficient effects of the defendant liable to be taken in execution by *Stoveld* and *Upperton*.

ABBOTT C. J. The question in this case turns on the effect of the proviso, by which the deed was to be void in case any creditor whose debt amounted to 100*l.* or upwards, or any two creditors whose debts should amount to 150*l.* or upwards, should not execute it within three months. Now, the words "any creditor,"

are certainly large enough to comprize all those to whom the defendant owed money, but we are to look at the whole deed to learn whether those words are used in a general or limited sense. If they are used in the former sense, they would clearly include a mortgage. But it is conceded in argument that they do not apply to him. Then if so, they are clearly used in a limited sense, and the question is how far they are limited. Now, that can only be ascertained by looking at the whole deed, which is made between the defendant of the first part, certain trustees of the second part, and certain creditors therein named of the third part, and it recites that the defendant was indebted to *Poyntz* 153*l.* for rent, to the crown for 413*l.* for duties, to *Stoveld* and *Upperton* 400*l.* upon bond and judgment, and to the creditors named of the third part, in the sums of money set opposite their names in the schedule. Now, it is observable that *Stoveld* and *Upperton* are here mentioned and distinguished from the creditors of the third part. The deed then conveys the property of the defendant to trustees upon trust, to pay the rent due to *Poyntz*, the duties due to the crown, and the judgment-debt to *Stoveld* and *Upperton*, and then to pay all the creditors whose debts are under 10*l.* in full, and after that 5*s.* in the pound to all other the creditors mentioned in the schedule. The deed also contains a covenant, that the creditors who executed the indenture would release their claims on the defendant. Now, if *Stoveld* and *Upperton* had executed the deed, they would have been parties to this latter covenant, and the effect of that would be, to make them covenant to release that debt, which by the provisions of the deed had been previously agreed to be paid in full. But this would be an inconsistent provision,

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Went
against
GARRISON.

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 WILLIS
 against
 GOSWELL.

viz. I think, therefore, upon an attentive perusal of the deed, that it could not have been the intention that *Steele* and *Upperton* should execute the deed, but only those who were to receive the composition under the deed. That being so, the rule for entering a verdict for the plaintiff must be discharged.

Rule discharged.

EDWARD BLISS against JAMES COLLINS.

Two messuages were conveyed to such uses as *A.* should appoint, and in default of appointment to *A.* for life, and after the determination of that estate in his lifetime to *B.* for the life of *A.*, in trust for *A.* and his assigns; with remainder to *A.* in fee. *A.* leased both these messuages to a tenant at an entire rent of 65*l.* 10*s.* for a term of years, and during the continuance of that term, contracted to sell the re-

THE following case was sent by the Vice-Chancellor for the opinion of this Court.

By lease and release bearing date respectively the 28th and 29th of March, 1808, the release being made between *John Lovett* of the first part, *Edward Bliss* of the second part, *James Roche* of the third part, the said *Edward Bliss* of the fourth part, and *William Bliss* of the fifth part, for the considerations therein expressed; two several messuages or tenements in *Princes-street*, *Red Lion Square*, in the county of *Middlesex*, one called the *White Bear*, public house, and the other next adjoining thereto with their appurtenances, were with other hereditaments therein particularly described, conveyed and limited to such uses as *Edward Bliss* should

version of one of the messuages to *C.* In the contract the messuage was described on lease, together with another, and that the apportioned rent in respect of it was 40*l.* *A.* and *B.* afterwards conveyed the reversion of both houses, and the entire rent of 65*l.* 10*s.* unto *D.* to certain uses, viz. as to the said messuage which *A.* had contracted to sell, and the yearly rent of 40*l.*, together with all powers and remedies reserved for recovering the rent of 65*l.* 10*s.* to such uses as *A.* should appoint; and as to the other messuage and the residue of the entire rent to the use of *A.* in fee. *A.* afterwards appointed the messuage which he had contracted to sell, and the apportioned rent to the vendee: Held, that the latter did not acquire the same rights and remedies against the lessee as he would have acquired if the rent had been legally apportioned by a jury, the lessee for the term not being bound by an apportionment made without his consent.

by

by deed appoint, and in default of appointment, to the use of the said *Edward Bliss* and his assigns during his life; and after the determination of that estate in his life time, to the use of *William Bliss* and his heirs, during the life of *Edward Bliss*, in trust for *Edward Bliss* and his assigns, with remainder to the use of *Edward Bliss*, his heirs and assigns for ever. By a lease of the 29th September, 1810, made between *Edward Bliss* of the one part, and *James Remmonds* of the other part, for the considerations therein expressed, the said *Edward Bliss* did demise unto the said *James Remmonds* the said messuage or tenement called the *White Bear*, public house, and the said messuage or tenement adjoining thereto with their appurtenances, to hold to him from thenceforth for 21 years, at the yearly rent of 65*l.* 10*s.* *Edward Bliss*, on the 15th of March, 1814, duly contracted to sell the said messuage or tenement called the *White Bear* with the appurtenances, to the defendant, *Collins*, and by the printed particulars of sale it was declared that that house, with a house adjoining, was on lease to *Remmonds*, and that the apportioned rent in respect of the public house, was 40*l.* per annum. The defendant, *Collins*, having refused to complete his purchase, *Edward Bliss* filed his bill in the Court of Chancery against the defendant, for a specific performance of this contract. By lease and release, dated respectively the 23d and 24th of March, 1819, the release being between *Edward Bliss* of the first part, *William Bliss* of the second part, and *Samuel Harris* of the third part; after reciting the lease and release of the 28th and 29th March, 1808, and the lease of the 29th of September, 1810, and the sale of the public house called the *White Bear*, to defendant, *Collins*; and that,

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against
COLLINS.

1802:

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Bail
against
Collins.

in order to effect a legal apportionment of the entire rent of 65*l.* 10*s.*, preparatory to the conveyance to *Collins* of the purchased premises, *Edward Bliss* had determined, with the acquiescence of the said *Samuel Harris*, to grant and release the two several messuages and tenements thereinbefore mentioned, and the reversion and inheritance thereof subject to the lease, and also to the entire rent of 65*l.* 10*s.* reserved by the lease unto the said *Samuel Harris*, to the several uses thereafter limited concerning the same; it was witnessed, that for the considerations in the said indenture of release expressed, *Edward Bliss* did grant, bargain, sell, alien, release and remise, and for ever quit, claim, and the said *William Bliss* did bargain, sell, and release unto the said *Samuel Harris* and his heirs, all these two several messuages or tenements with the appurtenances therein described, to hold the said messuages and premises subject to the lease, and the term thereby granted and then unexpired, unto *Samuel Harris*, his heirs and assigns, to the uses thereafter declared, (that is to say) as for and concerning the said public house, the *White Bear*, with the appurtenances, and also as concerning the yearly rent of 40*l.*, part of the entire rent of 65*l.* 10*s.* reserved by the lease, together with all powers and remedies reserved in the said lease for recovering the rent of 65*l.* 10*s.*, so far as such powers relate to the said apportioned rent of 40*l.*, to the use of such persons for such estate, and in such proportions as the said *Edward Bliss* should appoint, and until appointment, and subject to such uses, estates, trusts, charges, and interests as should have been directed, limited, or appointed by the said *Edward Bliss*, to the use of the said *Edward Bliss* and his assigns during his life, with a limitation

limitation to *William Bliss* and his heirs, during the life of the said *Edward Bliss* upon trust for him; with remainder to the use of the said *Edward Bliss*, his heirs and assigns for ever, and, as for and concerning the said messuage or tenement adjoining the last mentioned messuage or public house, called the *White Bear*, with the appurtenances; and as concerning the said yearly rent of 25*l.* 10*s.*, residue of the said entire rent of 65*l.* 10*s.* reserved by the said lease, together with all powers reserved in the said lease for recovering the entire rent, to the use of *William Bliss*, his heirs and assigns for ever. By lease and release, bearing date respectively since the date of the last mentioned indentures, the release being between *Edward Bliss* of the first part, *William Bliss* of the second part, and *James Collins* of the third part, the said messuage or tenement, and public house called the *White Bear*, with the appurtenances, and also the yearly rent of 40*l.*, part of the entire rent of 65*l.* 10*s.* reserved by the said indenture of lease, together with all powers and remedies reserved in the said lease for recovering the rent of 65*l.* 10*s.*, so far as such powers relate to the apportioned rent of 40*l.* were appointed, limited, and conveyed by *Edward Bliss* and *William Bliss*, unto, and to the use of the said *James Collins*, his heirs and assigns for ever.

The question directed by the Vice-Chancellor for the opinion of this Court was, whether the purchaser of the estate in question had, by the aforesaid conveyance of the vendor and his trustee alone, without the concurrence of the lessee, acquired the same rights and remedies against the lessee in respect of the apportioned rent of 40*l.* therein reserved to him, as he would have acquired in case no rent had been mentioned in such conveyance

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veyance from the vendor and his trustee, and the annual rent of 40*l.* had been legally apportioned by a jury for that part of the reversion of the premises in question. This case was, in part, argued at the sittings before last *Michaelmas* term, by

Sugden for the plaintiff. The lessor may apportion the rent without the concurrence of the lessee. Where the reversion is severed by a grant of part of the premises, a rent service, incident to the reversion, is to be apportioned, (*Co. Litt.* 148. *a.*, and *Collins and Harding's case*, 13 *Co.* 57. *a.*); and if there be no apportionment at the time, and the two reversioners cannot agree, then in an action of debt brought by one of them for the rent, a jury is to ascertain the proportion in which it is to be divided between them. This becomes necessary only for the purpose of settling the respective rights of the reversioners, and not with a view to the interests of the tenant. If the lessor, by the instrument conveying part of the premises, fixes the amount of rent which is to accompany it, the rights of the reversioners do not admit of dispute, and an apportionment by a jury is not requisite. The tenant will not be prejudiced by being compelled to pay a particular portion of rent out of a particular portion of the property. The entire rent before issued out of the entire land, and the landlord might distrain upon every acre of the land for the whole rent; and though the lessee may have underlet a part at a smaller rent, it is equally liable. In *Walter v. Maunde (a)*, the Master of the Rolls decided that a landlord contracting to sell part of a demised estate, with an apportioned rent, could make a good

(a) 1 *Jac. & Walk.* 181.

title to the apportioned rent without the consent of the tenant, and intimated a very strong opinion that the purchaser of part would have the same remedies for the apportioned rent as the original landlord would have had for the entire rent.

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The Court, after hearing *Sugden*, stated that they thought it necessary to confer with the Vice-Chancellor before they heard the case further argued. In last term it was again argued by

Preston for the plaintiff. It may be admitted that, consistently with the authorities, the rent could not be apportioned by a vendor and purchaser so as to bind the tenant. The purchaser, however, has the same rights and remedies against the lessee in respect of the apportioned rent as he would have had in case no rent had been mentioned in the conveyance from the vendor, and the annual rent of 40*l.* had been apportioned by a jury. It is clear that a rent may be apportioned; *Co. 1. Inst.* 148.; *2 Inst.* 504. and *Bacon's Abr.* tit. *Rent*, *M.* are authorities in point. The passage in *2 Inst.* 504. is full and explicit: "If a man make a lease for years, reserving a rent, if he grant away part of the reversion, the rent shall be apportioned by the common law, and albeit the grantee of part demand or claim more in his action of debt or avowry than is due, yet shall he recover so much as the jury shall find upon a just apportionment to be due." And for this, four reasons are given. "1st, For, that it is a rent-service, and not a bare contract, and rent services were apportionable at the common law. 2d, It is incident to the reversion, which is severable et accessorium sequitur naturam sui

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principalis. 3d, The rent being a rent-service is severable by recovery of part in an action of waste, or upon surrender in part. 4th, It is a general case, and specially in case of wills, which many times are void for a third part." (a) [Abbott C. J. The authorities go to establish this position, that there are two modes of apportioning rent, one by granting the reversion of part of the land out of which the rent issues; the other by granting part of the rent to one person and part to another. In the present case, each portion of the rent issues out of the whole land. Bayley J. Suppose the grantee to distrain for 40*l.* rent, the avowry must state that the tenant held it at an annual rent of 40*l.*] It may be admitted, that the avowry must so state the title to the rent; but the reversioner may recover a less sum than 40*l.*, though he states the tenancy to be at 40*l.* a-year. However, it is conceded, that unless this case assumes that the rent has been duly and legally apportioned, there is great difficulty in arguing the plaintiff's case on grounds which are tenable. It is incumbent on the defendant to shew that his remedies at law are different, in consequence of the rent being apportioned by the lessor, than they would have been if the rent had been apportioned by a jury. The right of re-entry for non-payment of rent is gone, because the condition was entire. The grantee has a remedy for the rent by distress, or by bringing an action of debt or covenant. These propositions are established by the passage already cited from 2 *Inst.* 504. The same doctrine is to be found in *Bacon's Abr.* tit. *Rent*, M: "If A, possessed of a term for 20 years, leases it for 10 years,

(a) 15 Co. 57.

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 against
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reserving 30*l.* rent, and afterwards *A.* devises 20*l.* of the rent to three of his sons, equally to be divided; this is a good devise, and each of the sons shall have an action of debt for his third part, though the reversion to which the rent was originally incident remains entire." Now, in the case put, the lessor divides the rent by his own act only, and he might divide it into as many parts as he pleases, obliging the tenant to pay each separately, and rendering him liable to different remedies. This power, of apportioning the rent by the lessor, will be beneficial to the tenant, by preventing the necessity of an action of debt for the purpose of having the apportionment made by the jury. And it is observed by Lord Ch. B. *Gilbert*, that the apportionment imposes no hardship on the tenant; for, though it subjects him to several actions and distresses, he may always avoid them by punctual payment.

Chitty, contra. The apportionment can only be legally made by the lessor, with the consent of the lessee, or by the verdict of a jury. It cannot even be made by the Court. This is so laid down in *Bacon's Abr. tit. Rent, M*, where all the authorities are collected. Indeed, if this apportionment be valid, how is the tenant to know what sum he is to tender to the person claiming the rent? If the reversion belongs to two tenants in common, the tenant cannot discharge himself against one by paying too much to the other; but the former may distrain. *Harrison v. Barnby*. (a) If this apportionment is valid, the tenant may, without notice, pay too much to either. It is clear that if there be a right of re-entry reserved to the purchaser of part of the premises, he cannot

(a) 5 Term Rep. 246.

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against
Collins.

enter alone; neither can he distrain, because the tenant, who has contracted only for the payment of an entire rent, is not subject to distress except for the whole. If the tenant concurs in the conveyance, and makes himself tenant to the purchaser at the apportioned rent, the latter will have all the remedies against the tenant which he would have had if the apportioned rent had been originally reserved. Here the tenant did not concur in the apportionment, and it cannot, therefore, be binding upon him.

Preston, in reply. The form of the question assumes that the apportionment is equivalent to one by a jury, and the only question is, whether the landlord has the same remedies in one case as in the other. If the Court does not so consider the question, no reason can be offered for the right of binding the tenant by an apportionment to which he was not a party.

The following certificate was afterwards sent :

We have heard this case argued by counsel, and are of opinion, that the purchaser of the estate in question hath not, by the aforesaid conveyance, acquired the same rights and remedies against the lessee as he would have acquired if the rent had been legally apportioned by a jury; inasmuch as we think, that the lessee is not bound by this apportionment, made without his consent, but may dispute the propriety thereof, and cause the rent to be apportioned anew by a jury. (a)

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

1822.

ARDEN against CONNELL.

DEBT for use and occupation, in the Palace Court. Judgment by default. The prothonotary of that court would only permit interlocutory judgment to be signed, and expressly refused to suffer the plaintiff to enter up final judgment; and, on an application to the judge of that court, he refused to interfere.

In debt for use and occupation after judgment by default: Semble, that a writ of enquiry is necessary before signing final judgment.

Thesiger now moved for a mandamus to the judge of that court, requiring him to permit final judgment to be signed; and he contended, that by the general practice in actions of debt, the plaintiff was entitled to have final judgment. In writs of enquiry the jury were sworn to assess the damages between the parties; but in debt nominal damages only were given. A writ of enquiry was, therefore, nugatory, and of course an interlocutory judgment would be irregular.

HOLROYD J. (a) It is not true, as an universal proposition, that in debt, where the defendant suffers judgment by default, the plaintiff is entitled to final judgment without executing a writ of enquiry. In actions on the stat. of *Edw. 6.* for not setting out tithes, there must be a writ of enquiry to ascertain the value of the tithe; so, in an action of debt for foreign money, a jury must find the value of the money. In the old form of declarations of debt, the contract stated was, that *A.* sold to *B.* a horse for a particular sum; and if the defendant suffered judgment to pass by default, he was considered

(a) The only Judge in Court.

1692.

thereby to acknowledge that the whole sum was due. I think, therefore, that it is not by any means clear that a writ of enquiry is not necessary in this case, and that being so, I think that no mandamus ought to issue.

Rule refused.

Priddy,
June 21st.

FRANCIS *against* CRYWELL.

Declaration for tithes bargained and sold. Plea, that before the exhibiting of the plaintiff's bill the defendant paid to the plaintiff a sum of money parcel, &c. in discharge and satisfaction of the promises in the declaration mentioned, and that plaintiff accepted the same in satisfaction and discharge of the promises. Replication, that before the exhibiting of the bill, the plaintiff had sued out a latitat, and that the defendant did not, before the plaintiff sued out that writ, pay the plaintiff the said sum of money in manner and form as the defendant had alleged. Upon demurrer, it was held that the plea was bad, because it did not allege the

ASSUMPSIT for tithes bargained and sold: Plea, that before the exhibiting of the bill of the plaintiff, the defendant paid to the plaintiff the sum of 19*l.*, parcel, &c. *in discharge and satisfaction of the promises and undertakings in the declaration mentioned*, as to the said sum of 19*l.* parcel, &c.; and that the plaintiff accepted and received the said sum, in satisfaction and discharge of the said premises and undertakings. Replication, that, before the exhibiting of the bill, plaintiff had sued out a latitat, and that the said defendant did not, at any time before the plaintiff prosecuted that writ, pay to the plaintiff the said sum of 19*l.*, parcel, &c., *in manner and form* as the said defendant had above in his said plea alledged. To this replication there was a demurrer and joinder.

Manning, in support of the demurrer. The plea of accord and satisfaction, after action brought, is a good bar to the action, *Com. Dig. Plader*, 2 G. 10., and it may be pleaded generally, although the payment and acceptance, which form the gist of the plea, were subsequent to the issuing of the writ, for here there was no continuance. In *Clift's Entries* (p. 202.) there is a precedent payment to have been in discharge of the costs and damages accrued by reason of the non-performance of the promises,

1822.

FRANCIS
BYDAN
CATWELL.

of a plea exactly similar to that which is pleaded in the present case, and Lord C. B. *Comyns* refers to it, as an authority for the principle above mentioned. In *Holland v. Jourdine*, 1 *Holt*, N. P. C. 6., Lord C. J. *Gibbs* expressly ruled that payment by a defendant, of the debt *and costs*, after action brought, although he held a receipt for the sum paid, was no answer to the action under the *general issue*, but was the subject matter only of a special plea. In *Sullivan v. Montagu* (a) it was conceded in argument, that a matter of defence arising after action brought, might be specially pleaded. The plea in the present case is in accordance with this rule, and by shewing that payment was made in discharge of the promises and undertakings mentioned in the declaration, offers a sufficient answer in law to the action. It is true that the plea does not allege payment of the damages, accruing by reason of the non-performance of the promises and undertakings in the declaration; but that omission is supplied by the plaintiff's acceptance of the sum tendered to him, and having so elected to take that sum in discharge of the claim set out in the declaration, he is thereby precluded from taking the objection that a larger sum ought to have been paid. In *Perry v. Odingsell* (b) the defendant pleaded payment of the debt only. It is not usual, in ordinary pleas of payment before action brought, to aver that the money was paid in satisfaction of the damages. This is similar to the plea of *solvit post diem* to debt on bond, which has been decided to be a good bar, although the payment of interest was not alleged. It does not appear from the replication that any further sum was due, and the presumption is in favour of the defend-

(a) *Dougl.* 109.(b) 4 *Mod.* 250.

1822.

FRANKS
against
CARWELL.

ant, who alleges a payment, accepted without dispute by the plaintiff.

Justice, contra, was stopped by the Court.

ABBOTT C. J. The plea avers that the sum was paid and accepted only in satisfaction of the promises and undertakings in the declaration, before the exhibiting of the bill by the plaintiff. The replication, by setting out a writ issued prior to the payment and acceptance, shews a further demand to which the defendant was liable, viz. the costs of the writ. The plea, therefore, to have been a sufficient bar, should have alleged a payment in discharge, not only of the promises and undertakings in the declaration, but of all costs and damages accrued by reason of the non-performance of those promises and undertakings. That allegation being omitted, the plea is incomplete, and is not a legal bar to the action.

BAYLEY J. In the usual case of a plea of payment before action brought, it does not appear upon the record that the plaintiff has sustained any damage by the non-payment at the stipulated time. Assuming this to have been a good plea when pleaded, yet it now appears by the replication that the plaintiff has been damnified by being compelled to issue a writ. The plaintiff might have rejoined that the money was accepted in satisfaction of the damages, as well as of the promises.

HOLROYD J. It was decided in *Perry v. Odingsell*(a), that payment after the day is good by way of discharge,

(a) 4 Mod. 250.

but not of satisfaction. In covenant for non-payment of rent, *riens in arrear* is a bad plea, because it confesses the covenant to be broken, and tends only in mitigation of damages. Here, upon the whole record, it appears that the plaintiff had a cause of action, in respect of which, he has sustained a damage which is yet unsatisfied. The defendant ought to have pleaded that the money was paid in satisfaction of the damages sustained by the non-performance of the promises.

Judgment for the plaintiff.

JAMES and Wife against TALLENT.

Friday,
June 21st.

DEBT against the defendant as executor of one *Packard*, deceased, upon a bond given by the latter to *Susanna James*, while she was sole and unmarried, for 500*l*. The condition set out in the declaration recited, that *John Packard* had for several years cohabited with the said *Susanna*, then *S. Danby*, and had by her two children, *G. Danby* and *L. Danby*, and that she being desirous to put an end to such connexion, had requested *Packard* to make a suitable provision for herself and children, which he had agreed to do; and that she, at the request of *Packard*, had procured two sureties to enter into a bond to indemnify him against molestation; and that, for the purpose of making the provision, *Packard* had agreed to enter into the bond declared upon, the condition of which was declared to

The condition of a bond recited that the obligor had cohabited with a woman for several years, and had by her two children therein named, and that she being desirous to put an end to the connexion, had applied to the obligor to make a provision for herself and children, which he had agreed to do, and for that purpose the obligor entered into the bond in question, which was conditioned to pay to the mother yearly,

during the joint natural lives of herself and two children, a certain sum therein mentioned, the annuity to be applied to the maintenance and education of the children as well as of herself; or in case of the death of the two children therein specifically named, then the same annuity was to be payable to her during her life. One of the children died during the lifetime of the mother: Held, that the annuity was payable to her during her life at all events.

be,

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JAMES
against
TAKESBY.

be, that if *Packard* should pay to *Susanna* yearly, during the time of the joint natural lives of *S. Danby*, *G. Danby*, and *L. Danby*, an annuity of 30*l.* payable by four equal payments as therein mentioned, the said annuity to be applied to the maintenance, clothing, and education of the said *G. Danby* and *L. Danby*, as well as for the maintenance and support of *Susanna Danby*: or in case of the death of the said *G. Danby* and *L. Danby*, if *Packard* should after that event happened, pay unto the said *Susanna Danby* yearly, during her natural life, an annuity of 30*l.* on the days therein before mentioned, or if during the payment of the first mentioned annuity, the said *S. Danby* should molest or interrupt the said *Packard*, then the obligation should be void. Breach, that after the death of *L. Danby*, but during the lifetime of the said *G. Danby*, and the said *Susanna Danby*, to wit, on the 25th *December*, 1821, the sum of 7*l.* 10*s.* of the annuity became due, which the defendant refused to pay. Plea, that *Packard*, in his lifetime, well and truly paid the annuity during the joint and natural lives of *Susanna Danby*, *George Danby*, and *Louisa Danby*, and that in the lifetime of the said *G. Danby*, and before the said sum of 7*l.* 10*s.* became due to the said *S. Danby* the said *Louisa Danby* died, and the said *G. Danby* is now living. To this plea there was a general demurrer.

Chitty, in support of the demurrer, contended that it was the manifest intention of the parties that the annuity should be payable to *Susanna Danby* at all events during her life. The contrary construction would give the mother an interest in the death of the surviving child;

child; because, until that event happened, the annuity would not be payable at all.

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JAMES
ROBINSON
TALBOT.

Robinson contra. The words of the bond are set out according to the legal effect, not the tenor; and the breach assigned does not correspond with the condition, that is, that *Packard*, during the joint lives of *Susanna Danby*, *George Danby*, and *Louisa Danby*, should pay to *S. Danby*, yearly, an annuity of 30*l.*, or in case *George Danby* and *L. Danby* die, he should pay another annuity to *Susanna Danby*. The first annuity is to be payable only during the continuance of the three joint lives; the second is to be payable only on the determination of two of the lives. The breach assigned is, that after the death of *L. Danby*, and during the lives of *Susanna* and *George Danby*, the defendant did not pay. Now the breach is not within the condition, either in terms or effect; for *joint lives* mean the lives of all; and in case *G. and L. Danby die*, means in case both of them die. If the argument on the part of the plaintiff be well founded, he might have set out the effect of the bond to be according to the fact that has happened. He might have stated that the condition of the bond was, that if *Packard*, during the lives of *Susanna* and *George Danby*, should pay, and averred that *Susanna* and *George* were living; and if the defendant had pleaded non est factum he would, according to the plaintiff's argument, have been entitled to recover. If, on the other hand, the defendant would have had judgment on that plea, he must have judgment now, because the breach does not come within the meaning of the condition. The defendant's plea is good, for it is, in the first part, a plea of performance in the very words
of

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JAMES
against
TALLENT

of the condition; and as to the second part, it shews that that condition precedent has not taken place, without which the obligation does not arise.

ABBOTT C. J. We must look at the whole of the instrument, and must put such a construction upon it as will answer the manifest intention of the parties. Here the annual sum is the same, and is payable on the same days in every event; and the object appears from the recital of the bond to have been to provide for the mother as well as for the children; and if both the children die, the mother is to have the annuity for her life. It appears to me, therefore, to have been the manifest intention, that the annuity should be payable at all events during the life of the mother. That being so, I think that the plaintiff is entitled to the judgment of the Court.

Judgment for the plaintiff.

Friday,
June 21st.

Cox against BUCKNELL.

Where a plaintiff had issued one writ against three defendants for separate causes of action, and after delivering three separate declarations *de bene esse*, entered one common appearance according to the statute for all the three defendants, and signed three interlocutory judgments as for want of a plea: Held, that this was irregular.

CAMPBELL moved to set aside the judgment in this case for irregularity, with costs. There was only one writ issued against the defendant and three other persons for separate causes of action. The plaintiff filed separate declarations conditionally against the defendant and two of the other persons to plead within first four days of this term, and three separate rules to plead were given. Subsequently to this, on the 12th of

June,

June, the plaintiff's attorney filed one common appearance, according to the statute, for all the three defendants, and signed three separate interlocutory judgments for want of a plea. This, he contended, was irregular, inasmuch as the plaintiff could not enter one common appearance after having delivered three separate declarations *de bene esse*.

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against
BUCKNELL.

Maule shewed cause in the first instance. If the defendants might have appeared jointly, and put in the same bail, the plaintiff, under the statute, may enter one joint appearance for all three. And they clearly might so have done, for till the declaration of the plaintiff they cannot tell whether he means to declare jointly against all or not.

ABBOTT C. J. This rule must be absolute. It is unnecessary to say whether a joint appearance before declaration delivered would be irregular or not. But after separate declarations it clearly would be so. This case is a *fortiori*; for here the plaintiff, after delivering separate declarations, has himself entered a joint appearance.

Rule absolute.

Campbell then applied for the rule to be absolute, with costs; but as it appeared, that in the notice of motion given to the plaintiff's attorney, it was stated that application would be made to set aside the writ, and all subsequent proceedings for irregularity, the Court refused the costs, inasmuch as it clearly appeared that the writ was regular.

1822.

Tuesday,
June 25th.

The KING *against* JAMES.

A commitment for a contempt, being a commitment for punishment, must be for a time certain, and consequently a commitment for a contempt till the defendant is discharged by due course of law, is bad.

CAMPBELL, on a former day, moved for a writ of *habeas corpus* to the keeper of the gaol for the county of *Caermarthen*, to bring up the body of the defendant, on the ground that he had been illegally committed, by two justices of the peace, for contempt, under the following warrant of two justices: "Receive into your custody the body of *Thomas James*, sent by us, and charged by us, upon view for insulting behaviour towards us, by telling us that we were biassed and prejudiced in our conduct towards him as magistrates, in the due execution of our office as magistrates of the county of *Caermarthen*, and keep him in custody until he shall be discharged by due course of law." He contended, first, that justices of the peace, not sitting in a court of sessions, had no power to commit for a contempt; and, secondly, upon the facts disclosed in his affidavit, that the defendant had not been guilty of any contempt for which he could lawfully be committed. In addition to these objections, there was a third which appeared upon the face of the warrant. For, at all events, as this was a commitment for punishment, it ought to have been for a time certain, and as there was no course of law by which the defendant could be discharged, such a commitment, if valid, amounted to perpetual imprisonment.

ABBOTT

ABBOTT C. J. Without giving any opinion upon the power of a justice of peace to commit for a contempt, this warrant appears to us to be bad, for not committing for a time certain. Take the writ.

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The King
against
JAMES.

The defendant being now brought up, under the habeas corpus, *Campbell* moved that he might be discharged.

Taunton appeared for the magistrates, and stated, that he had affidavits of the facts of the case, to shew the nature of the contempt, and that he meant to contend, that the magistrates were justified in committing for a contempt.

ABBOTT C. J. Supposing a contempt to have been committed, and the magistrates to have had power to commit for the contempt, can you contend that a commitment in this form is valid?

Taunton admitted that he could not support the validity of the warrant.

Defendant discharged. (a)

(a) See 2 Hawk. P. C. c. 1. s. 16. *Rex v. Darby*, 3 Mod. 199. *Regina v. Wrightson*, Salk. 698. *Rex v. Rowel*, Strange, 420. *Patet v. Ad-dington*, Peake, N. P. C. 62. *Mayhew v. Locke*, 7 Taunt. 63. *Bushel's case*, Vaughan, 138. *Rex v. Clement*, 4 B. & A. 218.

1822.

Tuesday,
June 25th.

WILLIAMS against PRATT.

Where a plaintiff had been nonsuited at nisi prius on the ground of a trifling variance between the contract set out, and that proved, the Court granted a new trial with leave to amend the declaration, generally on payment of costs, with liberty to the defendant to plead de novo or demur.

IN this case, which was tried at the *Middleshirtings* after last *Hilary* term, the plaintiff was nonsuited on the ground of a variance. The declaration recited, that plaintiff was possessed of a certain memorandum or articles of agreement, &c., and also of certain fixtures, and then set out as the agreement between the parties, that the plaintiff should sell to the defendant the first mentioned memorandum, and the following fixtures, &c., and that the plaintiff would relinquish and give up to the defendant the said first-mentioned memorandum or articles of agreement on the 11th day of *August*, 1821. At the trial, the agreement produced in support of this was as follows "Memorandum, &c. *David Williams* agrees to sell to *John Pratt* the following articles, viz. An agreement, &c., also the following fixtures, &c. The above *D. W.* agrees to relinquish and give up to *J. P.* the aforementioned articles on the 11th of *August*, 1821." At the trial, the Lord Chief Justice was of opinion, that the word "articles," in the latter part of the agreement, meant to include, not merely the articles of agreement, but the fixtures also. And, on *Scarlett's* applying to set aside this nonsuit, the Court were clearly of the same opinion. But they granted him a rule nisi for a new trial, with leave to amend his declaration on payment of costs.

Gurney

Gurney and Lawes shewed cause. They referred to *Hoar v. Mill* (a), where the plaintiff was nonsuited on a very unimportant variance between "storehouse" and "storehouses." And yet the Court afterwards refused a similar application to the present. (b) At any rate, the amendment should be confined to this particular error, or otherwise the plaintiff will be at liberty to remodel his declaration altogether.

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 WILLIAMS
against
PRATT.

Scarbett and Reader, contra. Amendments of this sort have lately been allowed by the Court. And they referred to *Halhead v. Abrahams* (c), where a similar application was allowed by the Court of Common Pleas. And as this is on payment of costs, the Court will grant leave to amend generally.

Per Curiam. This rule must be absolute upon payment of costs. The plaintiff should be at liberty to amend his declaration generally, and the defendant may then either plead de novo or demur to the declaration, according as he may be advised.

Rule absolute accordingly.

(a) 4 M. & S. 470.

(b) This does not appear by the report, but it was certified to the Court by Gasche, of counsel in that cause.

(c) 5 Term. 81.

1892.

Tuesday,
June 25th.

LUXMORE, Gent., one, &c. against LETHBRIDGE,
Gent., one, &c.

Charges for holding the courts leet of a manor by the steward, are charges for business connected with his professional character as an attorney, and therefore are like conveyancing charges taxable, when found in a bill containing other taxable items.

THIS was an action brought by the plaintiff, an attorney of this court. The bill of particulars delivered, stated the cause of action to be; 1st, a bill for paying fees; 2d, bills of costs in several actions of ejectment; 3d, a bill of fees and disbursements for holding the courts-leet of the manor of *Paris Garden*, in the county of *Surry*, of which the plaintiff was the steward. On a summons being taken out, *Bayley J.* ordered the two first items to be taxed, but declined making any order as to the last. A rule nisi was obtained by *Coleridge* for referring the last bill of costs to the master to be taxed, the defendant undertaking to pay what was due, if any thing. In the affidavits in answer, it was sworn that former bills for holding the courts had been previously paid containing similar charges. As to this the defendant stated, that these had been paid in ignorance.

Patteson shewed cause. Here, the bill is not taxable. It is true, the bill of particulars contains some taxable items. But that does not make the whole taxable, it only makes the other items, if legal charges, and connected with his professional character, taxable: as for instance, conveyancing charges, *Mowbray v. Fleming* (a). Here, the charges are not of this description, they are

(a) 11 *East*, 285.

only for work and labour, and money expended on behalf of the defendant, and they consist partly of disbursements by the steward, and partly of his necessary expences, and there are no fees or allowances to the steward for granting leases, &c. This, therefore, was not business connected with his professional character as an attorney.

1827.

LUXMOR
against
LATHBRIDGE.

Coleridge contra, was stopped by the Court.

Per Curiam. We think this was business done by the plaintiff in his professional character as an attorney. The office of a steward of a manor is one usually so filled, and requires legal knowledge. These charges must therefore be subject to taxation under the circumstances of this case.

Rule absolute. (s)

(s) See *In re Aiken*, 4 B. & A. 49. *Hill v. Humphreys*, 2 Bos. & Pull. 345. *Marshall's case*, 2 Blacks. 912. *Ex parte C. C. College*, 6 Term. 105., and *Sayer's Rep.* 225.

The KING against The LONDON Assurance Company.

Tuesday,
June 25th.

PULLER applied to the Court for a rule nisi for a mandamus to the defendants, requiring them to permit a transfer to the assignees of *Timbrell*, a bankrupt, of eighty shares in the capital stock of the corporation then standing in their books in the bankrupt's name. The affidavits stated, that a commission issued against *Timbrell*, who was then in partnership with two

The Court will not grant a mandamus to a private trading corporation to permit a transfer of stock to be made in their books.

1822.

—
The King
against
The London
Assurance Co.

other persons, dated 8th *February*, 1821, under which he was declared a bankrupt, and assignees appointed. At the time he became bankrupt he held in his own right, 80 shares in the *London Assurance Corporation*, by virtue of which he was a director. By the charter, no person is qualified to be a director unless he has, at the time of being chosen, a given amount in their stock in his own name, in his own right, and for his own use, and not in trust for any person whomsoever; and an oath to that effect is required, and was taken by the bankrupt when he became a director. By the charter, assignments and transfers of stock must be made in a particular form therein pointed out, and no other way or method is to be used, nor can any transfer except one so made, be good or valid in law. The company had refused to permit a regular transfer of the shares into the names of the assignees to be made, and assigned two grounds; 1st, because they had received a notice from the solvent partners of the bankrupt, that the shares were joint property: and 2dly, that the company themselves claimed a lien for a debt due to them. Upon these facts he contended, that the Court should grant a mandamus for a transfer to the assignees, the legal representatives of the bankrupt, leaving the parties to establish these claims, if valid, afterwards: and he referred to *Anonymous (a)*, where a mandamus was granted to swear in a director of the Amicable Assurance, which is a company, like this, created by a charter from the crown. The case of *Rex v. The Mayor of London (b)* was the instance of a mandamus to restore a person to the office of the clerk of the *Bridge-house*

(a) 2 Str. 696.

(b) 2 T. R. 177.

estates, and in *Middleton's* case (a), a mandamus was granted to restore *Middleton* to the treasurership of the *New River* Water Company. It appears, therefore, that the Court have interfered in private corporations. Here, the assignees have no remedy at law, unless the Court grant this rule, and in *Rex v. The Marquis of Stafford* (b), *Buller* J. lays it down, "that a party applying for a mandamus must make out a legal right; though, if he shew such legal right, and there be also a remedy in equity that will be no answer to the application." Here, the assignees have a legal right, as representing the bankrupt to a transfer of these shares. In the case of *Rex v. The Bank of England* (c), there was no legal right on the part of the applicant. That case is, therefore, distinguishable from the present.

1822.
The Kings
against
The London
Assurance Co.

Per Curiam. We are not aware of any instance of a mandamus like the present having ever been granted, and if we were to grant this, we should be called upon to interfere in all cases of dispute between the members of private corporations. This company, although carried on under a royal charter, is a mere private partnership. But the writ of mandamus is a high prerogative writ, and is confined to cases of a public nature. The rule, therefore, must be refused.

Rule refused.

(a) 1 *Sid.* 169. 1 *Lev.* 123. 8. C.

(b) 3 *T. R.* 651.

(c) 2 *B. & A.* 620.

1822.

Wednesday
June 26th.

The KING against The Earl of CADOGAN.

Where a lord of a manor is indicted for a nuisance in not repairing the bank of a river, the Court will not compel him to allow the prosecutor, even though he is a tenant of the manor, to inspect the court rolls for the purpose of obtaining evidence in support of the prosecution.

THE defendant was indicted for a public nuisance, in not repairing, pursuant to his liability *ratione tenuræ*, a bank and wall next to the river *Thames*, and protecting from the river a public highway, in the parish of *Chelsea*. Plea, not guilty.

Chitty now moved for a rule, calling upon him, he being the lord of the manor of *Chelsea*, to permit the inspection of the court rolls of the court-leet and court-baron of that manor, on an affidavit from the solicitor for the prosecution, that such inspection was necessary for the prosecutor's case, and that it had been refused. And he contended that this, though in form a criminal proceeding, was really to try the right of repair, which was a civil right; and therefore, that this fell within the ordinary principle in which the inspection of corporation books, &c. is ordered by the Court.

But the Court thought that this was a criminal proceeding, and that a party was not under such circumstances bound to furnish evidence which might ultimately criminate himself.

Rule refused. (a)

(a) It did not appear by the affidavit, but it was stated in moving the rule, in answer to a question from the Court, that the prosecutor was a tenant of the manor.

1822.

ABRAHAM *against* PUGH.Wednesday,
June 26th.

GASELEE shewed cause against a rule to stay the proceedings in an action on a judgment pending a writ of error on that judgment. At the time the rule nisi was obtained, bail had not been put in and perfected, but before cause shewn, that had been done. He contended that the defendant had no right to make the motion till bail had been put in and perfected, and therefore the rule must be discharged, and cited *Smith v. Shepherd* (a), and *Bicknell v. Longstaff*. (b)

No motion can be made to stay the proceedings in an action on a judgment pending a writ of error, until bail have been put in and perfected.

Scarlett and *Chitty*, *contra*, contended that the cases were distinguishable on the ground that here the bail had now been perfected.

Per Curiam. That is immaterial; we are to look to the state of the circumstances at the time the rule was obtained; and we think, that in order to expedite proceedings in error, it is at all events right to hold, that a party shall not be allowed to make any motion under such circumstances until he has put in and perfected his bail.

Rule discharged with costs.

(a) 5 T. R. 9.

(b) 6 T. R. 455.

1822.

Wednesday,
June 26th.

NIZETICH *against* BONACICH.

Where a plaintiff shortly previous to making an affidavit of debt had written a letter stating that the defendant was a creditor of his, the court interfered in a summary way to discharge the defendant out of custody, on affidavits denying the debt, the plaintiff not having denied the writing of such letter by him, or alleged that the debt due to him had arisen subsequently to it.

GURNEY had obtained a rule nisi for the discharge of the defendant out of the custody of the sheriff of *Middlesex*. It appeared that the defendant, who was a foreigner, had come over to this country to settle some affairs with the plaintiff, against whom the firm, of which the defendant was one, claimed a balance, which by the affidavits was stated to be upwards of 4000*l.*, and it appeared also, that the plaintiff, who was a prisoner in the King's Bench, had applied to the insolvent court for his discharge, and in his schedule, had represented the defendant's firm as creditors to the amount of 4000*l.* There was also a letter, dated *November 2, 1821*, in the plaintiff's hand-writing, in which he stated that the defendant's firm were his principal creditors. Notwithstanding these circumstances, the plaintiff had made the requisite affidavit of debt, and had caused the defendant to be arrested on a bill of *Middlesex*, indorsed for bail for 2000*l.* under which he was at present in custody. The affidavits *contra*, denied the facts alleged, with the exception of the letter above referred to.

Scarlett shewed cause, and contended that the Court would not go into the merits of an arrest upon affidavits.

Gurney, and *R. V. Richards*, relied upon the hardship of the case, and the plaintiff's not having denied the

the

the letter, or alleged that the debt had arisen subsequently to it.

Per Curiam. Our opinion is entirely founded upon that letter, in which the plaintiff speaks of the defendant's firm as his principal creditors: now that letter he could not but have denied, unless it were genuine. We do not dispute, that in general the rule is as stated by the plaintiff's counsel, but we think this an exception. Our discharging the present defendant, will not however afford a precedent for many motions of the kind in future.

Rule accordingly.

Note. It being afterwards suggested that the letter, which was in Italian, did not bear the interpretation put upon it, that question was referred to the master.

WHITE *against* GOMPERTZ.

Wednesday,
June 26th.

CHITTY had obtained a rule nisi for setting aside the last detainer of the defendant in this cause, and all proceedings thereon with costs. The affidavits in support of the rule stated, that on the 30th of May, a detainer was lodged against the defendant, then a prisoner in the King's Bench, for 1785*l*. And on the 31st of May, this defendant was discharged as to this detainer, and a fresh detainer lodged for 1180*l*. only. The plaintiff on the same day served a notice to discontinue the first action on payment of costs, and on 1st June, the costs were taxed and paid. The defendant was previously in custody in execution for 317*l*. at the suit of another person. The affidavits on the other

Where a defendant being previously in custody in execution for a debt a detainer was lodged against him, but for too large a sum, and on this being discovered in a few hours, the plaintiff discontinued on payment of costs, and before the payment of costs lodged a fresh detainer. Held that this second detainer was regular, and that it was not like the case of a

of a fresh arrest, which cannot be made till the costs have been paid.

side

1822,

NISBETH
against
BOWACKE.

1822.

Writ
against
Cautions.

side stated, that it was merely a mistake, and that in a few hours after it was discovered, notice was sent to the Marshal, that the defendant was only to be detained for 1180*l.*, and on the next day the discontinuance took place.

Denman shewed cause, and contended that this was not the case of a new arrest, but only a correction of the former one. And here the defendant has sustained no inconvenience, for the mistake being discovered, notice of it was immediately given to the Marshal.

Chitty contra. Here the defendant has been detained for several hours on a debt of 1785*l.*, whereas he ought to have been detained for only 1180*l.*; and in order to obtain the rules, he must give security to the Marshal, which is thereby altered. He cited *Molling v. Buckholtz* (a), which was the case of an arrest upon a fresh writ, and contended that there was no distinction between that cause and the present.

The Court were, however, of opinion, that the cases were distinguishable. Here the defendant was previously in custody. This is merely rectifying a mistake in the amount for which he was detained, which might have been done without discontinuing. And the plaintiff is not to be prejudiced by having discontinued, and thereby placed the defendant in a better situation.

Rule discharged with costs.

(a) 3 M. & S. 153.

1822.

BLACKHURST *against* BULMER.Wednesday,
June 26th.

THIS case stood No. 90. in the printed list at the sittings in term; the defendant's counsel objected to its being tried out of its turn, and declined to appear for the defendant. The written list of causes, affixed in the usual way on the outside of the court, did not extend beyond No. 26. of the printed list. The cause was however tried by *Best J.* on the ground stated to him, that there was no substantial defence to the action; and that there were witnesses for the plaintiff remaining in town on purpose, whose residence was in *Lancashire*. No affidavit of merits was now produced in support of the application.

Where a cause stood in the paper below the last cause mentioned in the written list affixed at the outside of the court, and was tried (being stated to be an undefended cause) the counsel for the defendant objecting to it, and declining to appear. Held that the trial was regular, and the Court refused a new trial, there being no affidavit of merits.

D. F. Jones now moved for a new trial in this case, and contended that the trial was irregular. The present case goes a great deal further than *Fourdrinier v. Bradberry (a)*, for if this verdict can be supported, any cause in the printed list at whatever distance, may be taken, and a defendant applying to set aside the verdict, may be compelled to swear to merits. If this be so the written list would have the effect of misleading instead of assisting the persons interested. Besides, if this be regular, both counsel and attorneys will be obliged to attend during the whole of the sittings *de die in diem*, and the uncertainty will also be most inconvenient both to parties and witnesses.

(a) 5 B. & A. 328.

1822.

BLACKBURNET
against
BULMER.

ABBOTT C. J. There is no injustice in the particular case, inasmuch as the defendant does not venture now to swear to merits. Nor is there in the present instance any inconvenience, either to the counsel or the attorney for the defendant, for both were in fact present at the time of the trial, but the counsel, as a matter of policy, did not chuse to appear. With respect to the general rule, it may be doubted whether the modern practice of putting up written lists has not done more harm than good: but at all events it cannot be permitted that a defendant in any case shall prevent a judge from trying a cause in the printed paper, that he may think proper, merely for the purpose of delay, or at least without shewing some substantial ground either of justice or convenience.

Rule refused.

Wednesday,
June 26th.

OLIVA against JOHNSON.

Where a plaintiff carried on business abroad, and had no permanent residence in England, but was in England at the time of bringing the action, and it was sworn, had no intention of leaving the country: Held that this was no sufficient answer to an application for security for costs, inasmuch as it was not distinctly sworn that he resided and intended to continue to reside here. Held also, that it is no answer to such application, that the action is brought in pursuance of liberty reserved by the Vice-Chancellor, it not being brought by his direction,

months,

months, and still resided there; and that deponent did not believe that the plaintiff had any intention of leaving the kingdom, as he had often told him (the attorney,) that he had not. The affidavit further stated, that the defendant had sued out a commission of bankrupt against him, which being disputed by the plaintiff, the Vice-Chancellor ordered the plaintiff's petition to stand over, with liberty to him to bring an action at law, to try the validity of the commission, and that the present action was accordingly brought for that purpose.

1822.

OLIVA
against
JOHNSON.

D. F. Jones now shewed cause. The defendant is not entitled to demand security for costs. In *Porrier v. Carter* (a), it was held that a plaintiff is not compellable to find security for costs, on the ground of his being a foreigner, if he reside in England: and in *Maria v. Hall* (b), the Court adopted the same rule even where the plaintiff was not voluntarily resident here, but was a prisoner at war, actually confined in prison; nor will the Court require security for costs on the ground of the plaintiff being a bankrupt, *Anonymous* (c). Besides, it is a decisive answer to the present application, that this is an action brought in pursuance of liberty granted by the Vice-Chancellor, upon the hearing of a petition in bankruptcy, for the purpose of trying the validity of the commission. In *McCulloch v. Robinson* (d) the Court of Common Pleas decided, that security for costs could not be required in an action of this kind, even though the plaintiff with all his family were at the time gone to reside at *New York* in *North America*. It would be most unreasonable to stay proceedings until security

(a) 1 *H. Bl.* 106.(b) 2 *Bos. & Pul.* 236.(c) 2 *Taunt.* 61.(d) 2 *New Rep.* 352.

given,

1822.

OLIVA
against
JOHNSON.

given, when the defendant has taken all the plaintiff's property under the commission, and when his right to take the property is the distinct object of the action.

Parke contra, having observed that this was an action brought not by the *direction* of the Vice-Chancellor, but merely in pursuance of liberty reserved, the petition being ordered to stand over in the mean time, was stopped by the Court.

Per Curiam. As to the first point, the affidavit is not sufficient: it should go further, and state that the plaintiff has been, and is now a resident in this country, and that he *intends to continue to reside here*. As to the second point, the case of an action brought by the direction of the Vice-Chancellor, differs widely from that of an action brought merely in pursuance of leave or liberty reserved. If this had been a case of the former kind, it would have been distinctly within the authority of *McCulloch* and *Robinson*. But as it is, the plaintiff may apply to the Vice-Chancellor for his directions, as to security for costs being or not being required: we cannot take this case out of the general rule.

Rule absolute.

MEASURE *against* GEE.

A testator devised certain estates to his daughter for life, and after her decease to her son *A. B.* an infant, for life, and after the determination of that estate by forfeiture or otherwise to trustees, to preserve contingent remainders, but to permit *A. B.* to receive the profits during his life, and after the decease of *A. B.*, then to the heirs of his body for ever, with a devise over in case of the failure of his issue: Held that *A. B.* took an estate tail in remainder.

THE following case was sent by the Vice-Chancellor for the opinion of this Court.

On the 3d May, 1792, *John Hardy* made his will,

duly

duly executed to pass freehold estates, and in the will were the following clauses. And as to my real and personal estate, I give and devise the same in manner following, (that is to say,) “First, I give and devise unto my grand-daughter, *Ann Alcock*, and to her heirs and assigns for ever, all those my arable, meadow, or pasture lands, hereditaments and premises, situate, lying and being, in *Leverington*, in the isle of *Ely*, in the county of *Cambridge*, which I purchased of the trustees of *Mr. Daniel Swaine*; but in case it shall happen, that my said grand-daughter, *Ann Alcock*, shall depart this life unmarried, and without issue of her body lawfully to be begotten, then I give and devise the said arable, meadow, or pasture lands, hereditaments, and premises unto my daughter *Ann*, the wife of *William Tatam*, her heirs and assigns for ever. Also I devise unto my said daughter, *Ann Tatam*, all the residue and remainder of all my freehold and copyhold messuages, lands, &c. and with their and every of their rights and appurtenances, the copyhold part thereof I have duly surrendered to the use of this my last will, to hold the said freehold and copyhold messuages, lands, &c. with their appurtenances, unto my daughter, *Ann Tatam*, for the term of her natural life; and after her decease, then I give the said messuages, lands, &c. with their appurtenances, unto *John Tatam*, an infant, the only son of my daughter, *Ann Tatam*, for the term of his natural life; and after the determination of that estate by forfeiture or otherwise, then I give and devise the said messuages, lands, &c. with their appurtenances, unto *Henry Boulton* and *James Measure*, and their heirs, during the life of the said *John Tatam*, upon trust to

preserve

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against
GKE.

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against
GEE.

preserve the contingent uses and estates hereinafter limited and devised from being defeated and destroyed, and for that purpose, to make entries or bring actions as the case shall require: but nevertheless, to permit the said *John Tatam*, and his assigns, during the term of his natural life, to receive and take the rents and profits thereof, for his and their own use; and from and after the decease of the said *John Tatam*, then I devise the said messuages, lands, &c. with their appurtenances, unto the heirs of the body of the said *John Tatam*, lawfully to be begotten, his, her, and their heirs and assigns, for ever; but in case it shall happen, that there shall be failure of issue of the body of the said *John Tatam* lawfully to be begotten, then there was a devise over to the two daughters of *Anne Tatam*." The question for the opinion of this Court was, whether *John Tatam*, the son, took an estate tail in remainder in the estate and premises in question, under and by virtue of the will of *John Hardy*. The case was argued at the sittings before last *Michaelmas* term by

Preston for the plaintiff. By the settled rules of law *John Tatam* took an estate tail under this will. It is a general rule, that when an estate is limited to one for life, a subsequent limitation to the heirs of the body of that person creates an estate tail in the donee for life. This is laid down in *Mr. Fearne's Essay on Contingent Remainders*, p. 161. 6th edit., where all the authorities on the subject are collected. The rule in *Shelley's* case imposes this effect on the several gifts. *Morris v. Ward* (a), *Broughton v. Lang-*

(a) 8 Term Rep. 518.

ley (a), *Goodright v. Pullyn* (b), and *Coulson v. Coulson* (c), are the more relevant authorities. In the last case the devise was to *Robert Coulson* for life; remainder to trustees during his life, to preserve contingent remainders; remainder to the heirs of the body of *Robert Coulson*. It was held, that by the devise to the heirs of his body, he took an estate tail; and the authority of that case was confirmed by the decision in *Hodgson v. Ambrose*. (d) But the case of *Goodright v. Pullyn* (e) is the authority more immediately applicable. The language of the Court there is full, clear, and precise in favour of the plaintiff, and shews that these limitations created an estate tail. In that case, and also in *Shelley's* case (f), from which the general rule derives its denomination, there were words of superadded limitation; and whether the second gift be to heirs males of the body and their heirs males of their bodies, or their heirs of their bodies, or their heirs, does not prevent the application of the rule. These words of superadded limitation will convert the words "heirs or heirs males of the body," into words of purchase or designation. In all these cases the words of superadded limitation were rejected, as far as they did not quadrate with the intention of creating an estate tail, by means of the words "heirs or heirs male of the body." So in this case, the words "his, her, and their heirs for ever," must be discarded. The words of limitation over establish the general intention, that *John Tatam* was to be the stock of the family and the donee in tail. In

1822.

 MEASURE
against
GEE.
(a) 2 *Ld. Raym.* 873.(b) 2 *Ld. Raym.* 1437.(c) 2 *Atk.* 247.(d) *Dougl.* 337.(e) 2 *Ld. Raym.* 1437.(f) 1 *Rep.* 93.

1822.

Mr. Fearn
against
Gm.

order to convert the words "heirs of the body" into words of designation, giving interests by purchase, it would be incumbent on the defendant to shew that these terms were used in the sense of "children." No such intention can be collected from this will, and that construction would, in this case, defeat, not advance the intention. It would be very inconvenient, independently of disturbing settled rules, to treat two or more children as joint-tenants in fee; and yet that is the only construction which the defendant can aim to establish.

Sugden, contra. The law is not now as laid down by Mr. Fearn. The case of *Coulson v. Coulson* came under the consideration of the Court in *Hodgson v. Ambrose*, and the Court adhered to it only because it had stood as law for so many years. The old rule, however, is broken in upon by several decisions. In *Doe v. Perryn (a)*, the estate was devised to A., the wife of B., for life, remainder to trustees to preserve contingent remainders, remainder to the children of A. and B. and their heirs for ever, to be divided among them equally, and if one child, to such only child, and his or her heirs for ever, and for default of such issue, remainder over. At the death of the deviser, A. and B. had no child. It was held, that the estate limited to their children was a contingent remainder in fee, which, on the birth of a child, vested in that child, subject to open, and let in those that might be born afterwards, and that the remainders over would be defeated by that estate becoming vested, and that the words "for default of such issue" in such a case, meant "for default

1822.

MILTON
against
Gibb

of such children." In *Gretton v. Howard* (a) the devise was to the testator's wife, of all his real estate, she first paying his debts and funeral expences, and after her decease to the heirs of her body, share and share alike, if more than one; and in default of such issue, to be begotten by testator, to be at her own disposal. There being children of the testator and his wife, it was held, that the wife took only an estate for life, with remainder to the children, as tenants in common in fee. In *Doe v. Goff* (b), the testator devised an estate to his wife for life, and after her decease to his daughter *Mary*, and to the heirs of her body, to be begotten, as tenants in common, and not as joint-tenants; but if such issue should die before she or they attained 21, then to his son *Joseph*, in fee; and then he devised another estate to his wife for life, remainder to his son *Joseph*, and the heirs of his body, begotten or to be begotten; but if he died without issue, or such issue all died before he or they attained 21, then to his daughter *Mary*, and the heirs of her body, begotten or to be begotten, such issue, if more than one, to take as tenants in common. It was held, that the daughter *Mary* took only an estate for life in the first estate, with remainder to all her children equally as purchasers. In *Merest v. James* (c) there was a devise of freehold and copyhold lands to trustees, for the use of the testator's daughter for life, and after her decease, then to the use of the issue of her body, lawfully begotten; and in default of such issue, or in case none of such issue lived to attain the age of 21 years, then as to the lands at *H.*, over to the devisor's brother *S.* for life, and after his decease, to the

(a) 6 Taunt. 94.

(b) 11 East, 668.

(c) 1 Brod. & B. 484.

1822.

MASSON
against
GIL.

use of the issue of his body, or in default of such issue, or in case none of such issue lived to attain 21 years, then to devisor's brother *H.* for life, and after his decease, to the issue of his body, lawfully begotten, and in default of issue, then to devisor's sister, *E.*, her heirs and assigns for ever; and as to the lands of *W.*, upon the death of his daughter without issue, or if issue, they should not live to attain 21 years, to his brother *H.*, his heirs and assigns; and after the death of his daughter, without issue as aforesaid, all the messuage at *S.* to his sister *E.*, her heirs and assigns: It was held, that the daughter took an estate for life in the premises. This decision must have proceeded on the ground, that, upon the whole, the testator, by the word *issue* meant *children*. Now, here the case differs from *Hodgson v. Ambrose*, for not only is there a limitation to preserve contingent remainders, but there are superadded words of limitation to the gift to the heirs of the body. The case, therefore, falls within the later authorities which I have cited.

ABBOTT C. J. In all the cases cited by the defendant's counsel, a manifest intent appeared on the face of the will, that the children should take different interests from estates tail. We will, however, consider the case, and send our certificate.

The following certificate was sent:

This case has been argued before us, and we are of opinion, that *John Tatam*, the son, took an estate tail in remainder in the premises named.

C. ABBOTT.

G. S. HOLROYD.

W. D. BEST.

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LOWE against Sir WILLIAM MANNERS, Bart.

THE Vice-Chancellor sent the following case for the opinion of this Court. *Richard Lowe* being seised in fee simple of an undivided moiety of the *North-Witham Wood*, and of several closes in *North-Witham* and elsewhere in the county of *Lincoln*, and of other freehold estates, duly made and published his last will in writing, bearing date the 5th day of *February*, 1781, and duly executed and attested, so as to pass freehold estates, and amongst other things devised as follows: "I give all my landed estates in the different counties of *Derby*, *Bedford*, *Lincoln*, *Wilts*; and *Middlesex*, to my three friends, *E. Mills Mundy*, *Robert Williams*, and *Kempe R. Lowe*, by will, devised all his landed estates to trustees, and bequeathed 10,000*l.* as a portion to his daughter, *C. L.*, but in case she should marry any one of his three kinsmen named in the will, he gave to whichever of them she married certain estates therein specified, he taking the name of *Lowe*, and settling upon her an annuity of 1000*l.* a year during her life, and in case that circumstance did not take place with his daughter *C. L.*, he then directed that it might be offered to his other daughter, *A. L.* in every particular; and in case neither daughter should marry in the manner above mentioned, then he directed that his daughters should have 10,000*l.* each, and, in that case, he gave all his estates to *W. D.*, his kinsman, for ever, on his and his heirs taking the name of *Lowe* irrevocably. After the date of this will *C. L.* married one *W. H.*, who was not one of the persons named in the will who would have become entitled to the estate after she married him, and the testator paid her a marriage portion; and afterwards by a codicil to his will reciting her marriage, and that he had given her a fortune, he revoked all devises and bequests in her favour contained in his original will, and also all claim which her husband *W. H.* might have to any of his real and personal estates by virtue of his marriage with his daughter, *C. L.*, and by virtue of his said will, and in lieu thereof he bequeathed unto each of their children a pecuniary legacy, and he then directed that in case his other daughter should marry either of the persons mentioned in his will, then upon condition that either of those persons whom she married, and his heirs, would accept, take, and use the name of *Lowe only*, he gave all his real and personal estate unto such of those persons whom she married, and his heirs; and in case his daughter, *A. L.*, should not marry either of the persons mentioned in his will, or if she married one of them, and he refused to accept, take, and use the name of *Lowe*, in that case he revoked all his devises and bequests contained in his will and codicil in her favour, and in lieu thereof bequeathed her 10,000*l.* The testator died soon after the date of his codicil, and his daughter, *A. L.*, afterwards married *T. F.*, who was not one of the persons named in the will who would have been entitled to the estate in the event of her having married him, and upon that occasion the 10,000*l.* was paid to her, and *W. D.* then entered upon the testator's estates, and took upon himself the name of *Lowe*, and suffered a recovery: Held, that *W. D.* was seised of an undefeasible estate in fee simple in the estate in question.

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Brydges, for the uses hereinafter mentioned, appointing them executors of this my last will. 10,000*l.* I give as a portion to my daughter *Charlotte Layton*, otherwise *Charlotte Lowe*, 5000*l.* of which to be paid on the day of her marriage, and 5000*l.* in one year after, on condition she marries with the consent of any two of my aforesaid executors to a man of character and fortune, sufficiently unincumbered to make a proper settlement upon her; but in case she should marry with her own consent any one of my three kinsmen, *William Thomas*, or *John Drury*, her choice beginning with the eldest, then *Thomas*, and then *John*, my will is, that if any one of them takes place, which ever of them she chooses, I give him all the *Denby* and *Locke* estates on taking the name of *Lowe*, and settling one annuity or rent-charge of 1000*l.* a-year during her life; and in case the aforesaid circumstance should not take place with my daughter *Charlotte*, I then will that it may be offered to my daughter *Ann Layton*, otherwise *Lowe*, in every particular. And I charge the aforesaid estates in *Bedfordshire*, *Lincoln*, and *Wilts*, with the aforesaid sum of 10,000*l.*, on the special conditions aforesaid, to either of them that shall not marry as aforesaid. And should neither of the above marriages take place, I will that any one of the sons of my executor, *Edward Miller Mundy*, and a liking should take place, that on their taking the name of *Lowe*, and making the same settlement, the estates shall be theirs and their heirs male for ever. I will that the income of my fortune shall be the property of the person who marries either of my aforesaid daughters, and his heirs for ever, taking the name of *Lowe*, and that the entail be continued on all my fortune not to be disposed of or mortgaged, but for the

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the sole use of the income only to the name of *Lowe* for ever; and should it so happen that neither of my aforesaid daughters should marry in the manner I have mentioned, or to some worthy, good man, of an estate in fee of not less than 500*l.* in land or real property, unincumbered of 10,000*l.*, I will that my said daughters have 10,000*l.* each, to be paid by my executors at such time as they or any two of them think proper. And then I give all my estates, both landed and personal, to my kinsman, *William Drury*, and his heirs male for ever, on his and his heirs taking the name of *Lowe* irrevocably." After the date of the will, *Charlotte Layton*, otherwise *Lowe*, married *William Heath*, and upon that occasion *Richard Lowe* paid her a marriage portion. *Richard Lowe* afterwards made and published a codicil in writing to his will, bearing date the 25th day of *May*, 1785, part whereof was in the words following: "This is a codicil to the last will and testament of me *Richard Lowe*, Esq., and to be taken as part thereof. Whereas, in and by my last will and testament, bearing date the 5th day of *February*, 1781, I have appointed *Edward Miller Mundy*, *Robert Williams*, and *Kempe Brydges*, my trustees and executors. Now I hereby revoke that appointment; and I hereby appoint the said *Edward Miller Mundy*, together with *John Radford* and *Evan Lewis*, executors of my last will. And I devise and bequeath unto them and their heirs, all my real and personal estates, to hold to them and their heirs to the use of such person, and upon such events, and under such conditions, and subject to such charges as are mentioned and declared in and by my said last will and testament. And whereas, since the making of my said will, one of my daughters,

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Charlotte Lowe, otherwise *Layton*, hath intermarried with *William Heath*, Esq., on which marriage I gave my said daughter a fortune, therefore I do hereby revoke and make void all the devises and bequests contained in my said will for the benefit of my said daughter, *Charlotte Heath*. And I do hereby also revoke and make void all claim and right which the said *William Heath* might have to any of my real and personal estates by virtue of his marriage with my said daughter, *Charlotte Heath*, and under and by virtue of any devise or clause in my said will, or any construction thereof, and in lieu thereof, I give and bequeath unto each of the children of the said *William Heath*, to be begotten on the body of my said daughter, (except an eldest or only son,) the sum of 2000*l.* to be paid to such of them as shall be a son or sons at the age of 21 years, and to such of them as shall be a daughter or daughters at the age of 21 years, or day of marriage, which shall first happen. And I hereby charge my real estates with the payment thereof. And in case my other daughter, *Ann Lowe*, otherwise *Layton*, should marry either of the gentlemen, and in the manner mentioned in my said will, then upon this express condition, that either of those gentlemen whom she may so marry, and his heirs will accept, take, and use the name of *Lowe* only, I give all my real and personal estates, subject to my debts, funeral expenses, and legacies, and also subject to a rent charge of 1000*l.* per annum to my said daughter, *Ann Lowe*, otherwise *Layton*, for her life, and independent of her husband, unto such of those gentlemen whom she may so marry, and his heirs. And in case my said daughter, *Ann Lowe*, otherwise *Layton*, shall not choose to marry either of those gentlemen whom I have

mentioned

mentioned in my will for that purpose, or if she does marry one of them, and he should refuse to accept, take, and use the name of *Lowe*, in such case I hereby revoke all devises and bequests contained in my said will, and this my codicil to my said daughter *Ann*, and in lieu thereof I give and devise unto her 10,000*l.*, to be paid to her at the age of 21 years, or day of marriage, which should first happen. And I hereby charge my real and personal estates with the payment of the said 10,000*l.* and the interest thereof as aforesaid, and in all respects subject and conformable to this my codicil, I do confirm my last will and testament." Soon after the date of the codicil *Richard Lowe* died, and in the year 1789, *Ann Layton*, otherwise *Lowe*, married the honourable *Thomas Fane*, who, at the time of the marriage, had not an estate in fee of not less than 500*l.* in land or real property, unincumbered of 10,000*l.* And upon the occasion of that marriage, the portion of 10,000*l.*, given to her by the codicil of *Richard Lowe*, was paid to her out of his personal estate; and *William Drury* entered into the possession of the testator's undivided moiety of the said wood and woodlands, and closes, in the county of *Lincoln*, and of his other freehold estates, and took upon himself the name of *Lowe* in addition to the name of *William Drury*. In *Michaelmas* term, 1790, *William Drury Lowe* duly suffered a common recovery with double voucher of the said undivided moiety of the said wood, woodlands and closes, which recovery was declared to enure to the use of *William Drury Lowe*, his heirs and assigns. *William* and *Charlotte Heath*, and *Thomas* and *Ann Fane*, and *William*, *Thomas* and *John Drury*, and several sons of *Edward Miller Mundy*
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are now living. The plaintiff, *W. D. Lowe*, contracted to sell the undivided moiety of the said wood, woodlands and closes, to the defendant, Sir *William Manners*, and filed his bill in the High Court of Chancery, against the defendant for a specific performance of the contract.

The question directed by the Vice-Chancellor for the opinion of this Court was, whether the plaintiff was now seised of an indefeasible estate in fee simple, or of any, and what other estate in the undivided moiety of the lands and hereditaments in question. The case was argued at the sittings before last *Michaelmas* term.

Sugden, for the plaintiff. The question is, whether the marriage which has taken place, operates as a cesser of the power to marry any of the persons designated in the will; or, whether the daughter may not take the estate hereafter by marrying one of those persons. It was the intention of the testator, that the daughter should at once make her election; and having once married a person not of the favoured class, she was to lose the estate. The daughter was to have a different interest under the will according to the person she married. She had an election given her, to marry one of the *Drutys*, and in that event her husband was to have the *Denby* and *Locke* estates on taking the name of *Lowe*, and settling on her an annuity of 1000*l*. But if she married a person not of the favoured class, then she was to have a fortune of 10,000*l*. By the codicil, the testator revokes the devise to one of his daughters, she having married a person not of the favoured class, and states that he had given her 10,000*l*.: and he then tenders to the other daughter, the option of marrying one of the favoured class,

class, in which case her husband, after settling 1000*l.* per annum on her, is to have the estate on taking the name of *Lowe*. Then comes the clause which is decisive of the question in the cause. "And in case my said daughter shall not choose to marry either of the gentlemen whom I have named in my will for that purpose: or, if she marry one of them, and he should refuse to accept, take, and use the name of *Lowe*, then, and in such case, I revoke all devises and bequests contained in my will and codicil to my said daughter, and in lieu thereof, give her 10,000*l.* to be paid to her at 21 years of age or day of marriage, and until payment to bear interest." From the day of marriage, she was to be entitled to the fortune substituted in lieu of the estate to which her husband, if of the favoured class, would have been entitled. It is quite clear, that by the very act of marrying one not of the favoured class, she was to lose absolutely, all claim to the estate. The choice is only once tendered to her. Even if she did marry one of the favoured class, and he did not use the name of *Lowe*, the gift was revoked; and if she married any person not of the favoured class, the gift was also revoked. In *Hutcheson v. Hammond* (a), the testatrix gave her husband a power of appointing 3500*l.*, in case *Ann Jones* should during his life, marry without his consent. *Ann Jones* having married once with her father's consent, it was held that his power of appointment was gone.

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Preston contra. The codicil cannot have any influence on the construction of the gifts in the will. If the will has not given effectually, the codicil does not supply

(a) 3 Bro. Ch. Ca. 128.

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the defect. The first question is, whether the estate ever vested. The second, whether the gift was consistent with the rules of law respecting perpetuities. *Ann* might have married before *Charlotte* lost her election. The will does not impose on *Ann* the obligation of marrying during the life-time of *Charlotte*. In that case, during the whole period of *Charlotte's* life, the estate would not have vested in *Mr. Drury*. There is a material distinction between conditions which are to create an estate, and conditions which are to destroy or defeat an estate. The former are to be performed by construction of law as near to the words of the condition as may be, and according to the intent and meaning of the condition; and if the intention of the condition cannot be performed according to its terms, the gift will fail; but conditions that destroy an estate are to be taken strictly. In *Randal v. Payne* (a) the testator gave to trustees 4000*l.*, for the use of *Jane Wood*, if she should marry with consent of the trustees, if not, then only 1000*l.*; also to the same trustees 4000*l.*, to the use of *Martha Wood*, if she should marry with their consent, if not, only 1000*l.*; and if either of these girls should marry into certain families named, and have a son, the testator gave his estate to that son for life, with remainder over; if they should not marry, then the estate to *Randal* for life, and her son, in fee. A bill was filed, and there was a decree that the money should be invested in the funds till the event should happen. *Jane Wood* married with consent, but not into the favoured families; *Randal* filed a bill for the residue, as forfeited to him; but the Lord Chancellor said, "till they married nothing could vest, for marriage was a

(a) 1 Bro. Ch. Ca. 55.

condition precedent, then could any thing vest till the whole contingency became impossible? That suspends it during their lives. You suppose if they once married, they had lost all chance of marrying a *Rivington* or *Gosling*; if he had said so it would have been very well. Suppose the girls had married against consent, one of the husbands had died, and she had married into one of the favoured families, and had a son, and that son was here claiming the estate, the Court would not incline to refuse him." The bill was dismissed. Now that case is expressly in point. It is said that *Drury* takes the estate the instant the girls marry a person not of the favoured class. It is clear that no estate could vest in *Drury* until they both married. Did it then ever vest? Suppose one of the daughters married a person of the favoured class, and he refused to take the name of *Lowe*, the estate would not, on the marriage, vest in him; but he might take the name at any time during his life, and the estate would vest in him when he took the name. There is no reason, therefore, why the other part of the condition may not be performed at any time, during the life of the daughters. Secondly, this gift to *Mr. Drury* is void, because it has a tendency to a perpetuity; for it will not necessarily vest within 21 years after a life in being at the death of the testator. The gift is to a person not necessarily in esse; for the daughter may, 40 years after the death of the testator, marry a youth only 18 years of age, and who, consequently, was not in esse at the time of the testator's death. The gift is not to the daughters but to the persons whom they may marry, with a limitation over to *W. Drury*, on failure of effect of the former gift. *Proc-*

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tor v. The Bishop of Bath and Wells. (a) *Gee v. Audley* (b), *Leake v. Robinson* (c), are authorities upon this point. This is a gift upon a contingency, and it might have been suspended beyond a life in being, or 21 years, and was, therefore, void. The gift to the husband was open to this objection. It follows, that the alternate or substituted gift to Mr. Drury must be liable to the same objection.

The following certificate was afterwards sent:

This case has been argued before us; and we are of opinion, that the plaintiff is now seised of an indefeasible estate in fee simple, in the undivided moiety of the lands in question.

C. ABBOTT.

J. BAYLEY.

W. D. BEST.

(a) 2 H. Bl. 353.

(b) 1 Cox Rep. 324.

(c) 2 Merivale, 365.

The KING against HARRIS.

An information for perjury, stated that defendant, before a committee of the House of

INFORMATION by the Attorney-General against the defendant for wilful and corrupt perjury. The first count stated, that heretofore, and before the Commons, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c. It then set out the evidence so given. The count then averred, that the defendant, at the bar of the House of Lords, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c. It then set out his evidence, which was directly contrary to that given before the House of Commons, and concluded (after averments as to the identity of the persons and places referred to in the evidence on both occasions); and so the jurors aforesaid do say that the said E. H. did commit wilful and corrupt perjury: Held, on motion in arrest of judgment, that this count was bad.

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mitting the offence after mentioned, to wit, at a session of parliament holden on, &c. at *Westminster*, in the county of *M.*, to wit, at the parish of *Saint Margaret*, within the liberty of *Westminster*, in the county of *M.*, a certain bill, intituled, "An act," &c. was pending before the Lords Spiritual and Temporal, which said bill recited; that there was the most notorious bribery and corruption at the then last election for the borough of *Barnstable*, in the county of *D.*, and that such bribery and corruption was likely to continue and be practised in the said borough in future, unless some means were taken to prevent the same; and by which bill certain matters and things were proposed to be enacted, touching the election, to be thereafter had for burgesses to serve in parliament for the said borough: and that such proceedings were had upon the said bill in the said parliament before the said Lords Spiritual and Temporal, that afterwards, and during the said session of parliament, and before the committing, &c. to wit, on, &c. at, &c. It was ordered by the said Lords Spiritual and Temporal, amongst other things, that counsel should be at liberty to examine witnesses in support of the said bill. The count then stated, that the defendant, late of, &c. afterwards, to wit, on, &c., at, &c.; did appear before the Lords Spiritual and Temporal, that is to say, at the bar of the said Lords Spiritual and Temporal, as a witness in support of the said bill, and that he was then and there sworn, &c. before the said Lords, &c., the said Lords, &c. having sufficient and competent power, &c. And that upon the hearing the evidence before the said Lords, &c. in support of the said bill, certain questions then and there arose and became and were material, that is to say, &c. The count then

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then set out the questions, and the defendant's evidence before the House of Lords, and concluded by assigning the perjury as to each particular in the usual way. The second and third counts were similar in form to the first, differing only in the assignments of the perjury. The fourth count stated, that heretofore, to wit, on, &c. in the Lower House of parliament of the said late king, then held at *Westminster*, to wit, at the parish of, &c., *E. H. Esq.*, commonly called Lord Viscount *Clive*, *J. M. Esq.* &c., then being members of the Lower House of parliament, were in due manner, according to the form of the statutes in such case made and provided, chosen, nominated, and sworn to be a select committee to try and determine the merits of an election of two burgesses to serve in the said parliament, &c., as burgesses for the borough of *B.*, in the county of *D.*, as of the return of, &c. as burgesses, &c. And that the persons so chosen, &c., afterwards, to wit, on, &c., at a certain place adjacent to the House of Commons, to wit, at, &c., did in due manner meet to try and determine the merits, &c. And that the defendant afterwards, to wit, on, &c. at, &c. did appear as a witness, touching the merits, &c. before the said persons so chosen, &c. The count then stated his being duly sworn, and that he, being so sworn, "*deliberately and knowingly, and of his own act and consent*, did say, swear and give in evidence, &c." It then, after setting out his evidence before the committee of the House of Commons, proceeded to state, that heretofore, and before the committing, &c., to wit, at a session of parliament, holden on, &c., a certain bill, intituled, &c. was pending before the Lords Spiritual and Temporal, &c.; and then, after stating, as in the first count, that the defendant

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borough of *B.*, and the election, and the different persons named in the defendant's evidence before the House of Commons, and the borough of *B.*, &c. named in his evidence before the House of Lords, were the same borough of *B.*, &c., and not other and different. And then concluded: "And so the said Attorney-General says, that the said *Edward Harris*, to wit, at, &c. in manner and form aforesaid, did commit wilful and corrupt perjury to the great displeasure, &c." The fifth count varied from the fourth only in the statements of the evidence, which were different. The sixth and seventh counts were similar to the fourth and fifth, but added, that the questions in answer to which the respective evidence of the defendant before the Houses of Lords and Commons was given, were material questions. Plea, not guilty. At the trial, at the *Westminster* sittings after last *Michaelmas* term, before *Abbott C. J.*, the jury acquitted the defendant upon the first three, and found him guilty upon the last four counts of the information. A rule nisi was obtained in last *Hilary* term for arresting the judgment, on the ground that these counts were insufficient. (a)

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(a) The case of *Rex v. Knill*, which was precisely similar to the present, and growing out of the same transaction, and in which the indictment was in the same form, was tried on the same day; and the jury convicted the defendant on those counts which charged the perjury specifically to have been in the examination before the House of Lords. No evidence was given, except simply the proof of the contradictory oaths of the defendant on the two occasions. In that case *D. F. Jones* moved for a rule to shew cause why there should not be a new trial, on the ground that in perjury two witnesses were necessary, whereas in that case only one witness was adduced to prove the corpus delicti, namely, the witness who deposed to the contradictory evidence given by the defendant before the committee of the House of Commons: and he contended, that if this evidence were of itself sufficient, the danger intended to be provided against by the rule requiring two witnesses would be immediately let in, for one

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The *Solicitor-General, Raine, Gurney, Littledale, and Shepherd*, shewed cause. These counts are good. It appears on the face of the record that the defendant has deliberately and knowingly sworn, first, before the House of Commons, and, secondly, before the House of Lords; and on these occasions has made contradictory statements. It is, therefore, quite certain that the defendant must have committed perjury. No other mode can be devised of making the charge, and if this be not sufficient, the defendant cannot be punished. It is said that the Court cannot see on which of the two occasions the perjury was committed. But as both the tribunals were competent to administer the oath, that is not material. It is also put as a difficulty, that, supposing the oaths were in different counties, it would be impossible to say in which the party should be tried; but that difficulty does not exist here, for both the oaths are in the same county. [*Bayley J.* Suppose by act of parliament all perjuries committed before the 1st January are pardoned, and on an indictment like this it appeared that of the two contradictory depositions one was before and the other after that day: would the pardon extend to such a case?] It may be sufficient to say, in answer to this and the like objections, that in this case they do not exist; and, perhaps, in cases where they did exist, this form of indictment could not be

false witness would only have to swear to the fact of a contradictory statement upon oath by the defendant, and that would suffice without the confirmation of any second witness. Secondly, he insisted that mere proof of a contradictory statement by the defendant on another occasion was not sufficient without other circumstances, shewing a corrupt motive, and negating the probability of any mistake. But the Court held that the evidence was sufficient, the contradiction being by the party himself, and that the jury might infer the motive from the circumstances; and they refused a rule nisi for a new trial.

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adopted. In *Rex v. Thorogood (a)*, it was held in the Common Pleas, that where a man confessed an affidavit made by him to be false, that Court might, under 5 *Elix. c. 9. s. 9.*, order him to be pilloried for perjury committed in the face of the Court. Yet there, as here, it would be impossible to say on which of the two occasions the perjury was committed. There are precedents of indictments in this form, one of which is to be found in a note-book of *Chambre J.* And *Yates J.* convicted a person at the *Lancaster* assizes, 1764, on an indictment in this form, supported by similar evidence as in this case, which conviction was afterwards approved by Lord *Mansfield C. J.* and *Wilmot* and *Aston, Js.*, to whom he mentioned the case. And there was another case at the *York* assizes, where a similar verdict was given, on an indictment containing a charge like the present, where the only evidence was the two contradictory depositions. As to the argument, that a defendant, if, after an acquittal on such a count as this, he should be subsequently indicted in the usual form for perjury committed before the House of Lords, could not plead autrefois acquit, it is perhaps sufficient to say that it cannot apply to this individual case; for here he might so plead. But even if these counts objected to were the only counts in the information, the Court would probably consider the crown as having, in that case, elected to proceed in this way, and would, therefore, prevent them from taking further proceedings in the same matter. As to the omission of the words "wilfully and corruptly," that was necessary, because one of the depositions being true, both could not be wilfully and corruptly made. It is, however, charged,

(a) 8 Mod. 179.

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that the defendant deliberately, knowingly, and of his own act and consent, did swear, &c. and that is sufficient. In the fourth and fifth counts it is not averred that the defendant's evidence related to material questions. That averment is not necessary; for it is quite sufficient if on the face of the indictment the questions appear to be material. And this averment is always omitted in the entries in *Tremayne*. Besides, the sixth and seventh counts do contain the averment; so that it is not important to discuss that question.

Adolphus and D. F. Jones, contra. It may be admitted, that if the indictment had charged the perjury to have been committed before the House of Lords, the contradictory evidence previously given before the House of Commons might have been sufficient alone for the jury to have convicted the defendant of perjury. But then they would have found distinctly on which occasion the defendant had sworn falsely. This question is, however, very different. This is not a question upon the sufficiency of evidence, but upon the insufficiency of the shape and form of the accusation. The cases which have been mentioned are not authorities to govern the present; there the indictments appear to have contained counts framed in the ordinary way, as well as a count in this form, and there was a general verdict; and no such objection as the present could be available, if there was any one sufficient count. Besides, none of those cases appear to have undergone much discussion at the bar, or any consideration in *Westminster Hall*. With respect to the present experiment, it is in truth a charge, in the alternative, imputing, that either on the one occasion or the other, the defendant committed

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committed perjury. Now, according to all the rules of criminal pleading, every indictment must contain a precise charge of a specific fact, alleged to be a crime committed on a particular day and at a particular place. Here no particular time or place is alleged, as to the crime intended to be insisted upon; two oaths are stated, of which it is said one must be false; it may be equally said that one must be true; but which was false and which true, the indictment does not state. Suppose an acquittal on such an indictment, and a defendant to be afterwards indicted in the ordinary form for perjury before the House of Lords, he could not plead *autrefois acquit*, because it is not certain whether this indictment charges him with perjury there; he might then be indicted for perjury before the House of Commons, and he could not plead *autrefois acquit*, for a similar reason; and so, for one offence, he might be tried three times. Suppose, again, that the two oaths are in different counties: in which is he to be tried? Suppose, also, a pardon of all offences up to a particular day. These are difficulties which shew, that, as this count is contrary to the principles of criminal pleading, so is it also contrary to justice. In *Com. Dig. Indictment*, G. 2., it is laid down, that it is bad if the day be uncertain, as if the offence be laid in *Festo St. Petri*, and there be two feasts of *St. Peter*. And in the same book and title, G. 3., many instances are given of indictments for murder and felony, which were held bad for their uncertainty, and for their being laid, as here, in the alternative. (a) The present form is also contrary to all the precedents of indictments in ordinary use; and the incongruity is here manifest, for the persons

(a) See also 2 Hale's P. C. 178, 179.

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framing it are actually obliged to omit the words wilfully and corruptly, because they cannot say which of the two oaths was wilful or corrupt. And such an omission is fatal; *Rex v. Cox*. (a) This indictment is also opposed to the legal definition of the crime of perjury, which comprises a wicked intent and corrupt motive. The mere circumstance of a party's having sworn contrarily to what he did on a former occasion, is not, necessarily, perjury. It may have arisen from forgetfulness, inadvertency, or mistake; and therefore, a corrupt motive must be alleged; and yet, the bare inconsistency between the two oaths is all that is charged in this indictment. The same conclusion may also be drawn from the provisions of the statute 25 Geo. 2. c. 11., which, while it shortens the allegations in indictments for perjury, expressly retains and directs "the proper averments to falsify the matters wherein the perjury is assigned." Besides the point has been distinctly and solemnly decided; for in the case of *Rex v. Perrott* (b), the Court, in giving judgment, lays down the rule as to false pretences, that it must be stated in the indictment which are true and which false, in order to apprise the defendant of the charge; and they appear to have founded their judgment mainly on the analogy to the case of perjury, in which, as they all say, the falsification must not be to the whole, but to the particular thing relied on, as being false; and Lord *Ellenborough* there says, that the rule in cases of a mixed nature, where part is true and part false, is to separate, by specific averments, all that which is meant to be relied on as false. Here that is not done, and, therefore, this indictment is bad.

Cur. adv. vult.

(a) 1 *Leach's Crown Cases*, 82.

(b) 2 *M. & S.* 579.

And

And now, on this day, the judgment of the Court was delivered by.

1822.

~~removed~~
The King
against
HARRIS,

ABBOTT C. J. This case came before the Court on a motion in arrest of judgment, the defendant having been convicted on some of the counts of an information exhibited against him by the Attorney-General. One of these counts charges in substance, that a select committee of the House of Commons met to determine the merits of a petition, complaining of an undue election and return of two members of parliament for the borough of *Barnstaple*; that the defendant was sworn and examined as a witness before the committee at the parish of *St. Margaret, Westminster*, on the 1st of *March*, 59 G. 3., and then and there deliberately and knowingly, and of his own act and consent, deposed that he was a voter of the borough; that one *Wilkinson* took a part for Sir *M. L.*, one of the candidates, that the friends of Sir *M. L.* were entertained with eating and drinking at *Wilkinson's*; that he, the defendant, voted for Sir *M. L.*; that *Wilkinson* asked him for his vote, and told him he should have 5*l.*, with a proviso that he would give his word then to vote for Sir *M. L.*; that he did vote for Sir *M. L.*, and also for another of the candidates, Sir *Henry Thompson*; that he voted for Sir *M. L.* on account of the promise of 5*l.*, that he should not have voted for Sir *M. L.* without money, and that he should have given a plumper to Sir *H. Thompson*, if he had not had the money offered to him. The count then further charges, that at a session of parliament, a bill entitled "An act for preventing bribery and corruption in the election of members to serve in parliament," was pending before the House of Lords, reciting that bribery and

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corruption had been practised at *B.*, and was likely to be practised in future unless prevented; that in pursuance of an order of that house for liberty to examine witnesses in support of the bill: the defendant on the 25th June, 59 G. 3., at the parish of *St. Margaret*, appeared before the House of Lords and was sworn, and then and there knowingly and deliberately, and of his own act and consent, deposed that he was a freeman of *Barnstaple*, that he remembered the last election, that *Wilkinson* took a part in the election, and as he believed for Sir *M. L.*; that *W.* asked him to vote for Sir *M. L.*, and he told him he would, and that was all that passed; that *W.* did not at any time say any thing to him as to remuneration for loss of time, that *W.* did not promise him any satisfaction, or any thing at all, that the sum of 5*l.* was not mentioned between them, that there was not any entertainment going on at *W.*'s at any time before the election that he knew of; that he, the defendant, voted voluntarily for Sir *M. L.* or any other gentleman that he wished for, or that his mind led to, that that was his only reason for voting for Sir *M. L.* The count then avers the identity of persons and places, and concludes thus: "And so the Attorney-General says, that the defendant at the parish of *St. Margaret, Westminster*, in manner and form aforesaid, did commit wilful and corrupt perjury."

Another of these counts is to the same effect, but with the additional allegations, that the matters deposed by the defendant on each occasion were material.

It is to be observed, that these counts do not charge that the defendant on either occasion swore wilfully, falsely or corruptly; the conclusion that he committed wilful

wilful and corrupt perjury is drawn from the previous allegations, that he swore on each occasion knowingly and deliberately, and of his own act and consent, and from the manifest contradiction in the matters sworn. The question therefore is, whether perjury can be legally charged and assigned by shewing such contradictory depositions, with an averment that each of them was made knowingly and deliberately, but without averring or shewing in which of the two depositions the falsehood consisted. And we are of opinion that it cannot.

The first objection that occurs on the perusal of this information is the novelty of its form. One or two instances (a) of a similar form were mentioned at the bar,

(a) The following precedent was read during the argument from Mr. Justice Chambre's *Precedent Book*.

Lancashire, to wit. The jurors for our lord the king, upon their oath, present that heretofore, to wit, on the 17th day of January, 1774, at Manchester, in the county aforesaid, one copper dish of the value of 3s., ten pewter plates of the value of 6s., &c. &c. of the goods and chattels of one Robert Stevenson, in the shop of the said R. S., then and there being found, were feloniously stolen, taken, and carried away; and the jurors aforesaid, upon their oath aforesaid, further present, that afterwards, to wit, on the 25th January aforesaid, in the year aforesaid, James Dane, of Manchester aforesaid, cobbler, came before T. B. Bayley, Esq., then and still being one of the justices of our said lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the same county, and was then and there sworn, and took his corporal oath upon the holy gospel of God before the said T. B. B., the justice aforesaid, he, the said T. B. B. then and there having sufficient power and authority to administer the said oath to the said J. D. in that behalf, and then and there, upon his oath aforesaid, before the said T. B. B., deliberately and knowingly, did say, swear, and give information in writing, that on Monday night the 17th day of January then instant, he, the said J. D. saw James Taylor of ———, and E. Hunt of the same place, shoemaker, go into the shop of R. S. of M. aforesaid, brazier, in Hanging-ditch of M. aforesaid,

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against
Harris.

1692.

**The King
against
Hunt.**

bar, which, however, only shew that some respectable draftsmen may of late have thought the experiment worth trying; no one has ever received a judicial decision,

aforesaid, (meaning the said shop of the before-mentioned R. S.) and that he, the said J. D. was along with them, (meaning the said J. T. and E. H.,) and stood at the shop door, (meaning the door of the said shop of the said R. S.,) and that Taylor and Hunt (meaning the said J. T. and E. H.) filled a large sack or bag with pewter and other goods out of the said shop, and that Taylor (meaning the said J. T.) carried the sack off, and that Hunt (meaning the said E. H.) filled his pockets, and, that amongst other things, that Taylor (meaning the said J. T.) carried away were one copper dish, &c.; and that Hunt (meaning the said E. H.) carried away in his pockets one pewter gill, &c.; and the jurors aforesaid, upon their oath aforesaid, further present that at this present sessions of oyer and terminer and general gaol-delivery, holden at the Castle of Lancaster, in and for the said county, an indictment was found by the jurors aforesaid against the said E. H. for privately and feloniously stealing, taking, and carrying away the said first-mentioned one copper dish, &c. of the goods and chattels of the said R. S. in the shop of him, the said R. S. these being found; and the said E. H. being arraigned upon the said indictment before the justices aforesaid, pleaded not guilty thereto; and issue being duly joined upon the said plea so pleaded, the said E. H. was thereupon put upon his trial for the said felony at the said sessions of oyer and terminer and general gaol-delivery. And the jurors aforesaid, upon their oath aforesaid, further present that, at the said trial so then and there had as aforesaid, the said J. D. was produced as a witness against the said E. H., and was then and there sworn, and took his oath before the same justices on the holy gospel of God to speak the truth, the whole truth, and nothing but the truth of and upon the premises so put in issue as aforesaid; and the said J. D. being so sworn, did then and there, *deliberately and knowingly*, and of his own act and consent, say, depose, and give evidence before the same justices that he, the said J. D., did not see the said E. H. on the night when the said shop of the said R. S. was broken, and so the jurors aforesaid, upon their oath aforesaid, do say that the said J. D., *to wit*, at Lancaster aforesaid, did in manner and form aforesaid commit wilful and corrupt perjury, to the great displeasure of almighty God, &c.

The following observations then occur:

It has been doubted whether, if the same person swears contrary ways at different times, he can legally be convicted of perjury without some further

cision, and as instances of contradictory swearing have occurred at all times, and as this form of proceeding affords the greatest facility of proof to a prosecutor, the
want

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against
HARRIS.

further proof to falsify that testimony on which the indictment assigns the perjury. For it is said, that on which soever of his contradictory oaths the perjury be assigned, that oath must be taken to be true, unless disproved by two other witnesses. On the other hand, some have thought that if the indictment states the two contradictory oaths, and then concludes, that "so the defendant committed wilful and corrupt perjury," without any averment to falsify the facts sworn in either of the oaths, it is sufficient to warrant a conviction; perhaps an indictment in that form might be sufficient; but even upon the common indictment assigning the perjury upon one of the oaths only, and averring the falsity of the facts there sworn, (in the usual form,) it seems that the defendant may justly be convicted without any other proof of the perjury, than producing and proving the other deposition which the defendant had made in contradiction to that on which the perjury is assigned; for its being the defendant's own deposition, he cannot be admitted to say that deposition was false, for *nemo allegans turpitudinem suam est audiendus*, and if that be true, the other on which the perjury is assigned must of course be false. The reason why in other cases, the perjury must be proved by witnesses that outweigh the testimony of the defendant is, because, where there is only oath against oath, it stands in suspense on which side the truth lies. But when the same person has, by opposite oaths, asserted and denied the same fact, the one seems sufficient to disprove the other, and with respect to the defendant (who cannot contradict what he himself has sworn), is a clear and decisive proof, and will warrant the jury in convicting him on either, for whichever of them is given in evidence to disprove the other, it can hardly be in the defendant's mouth to deny the truth of that evidence as it came from himself. Upon this principle *Yates J.* convicted a man at *Lancaster Summer assizes*, 1764. He had first made his information on oath before a justice of the peace, that three women were concerned at a riot at his mill, (which was dismantled by a mob, on account of the price of corn;) and afterwards at the sessions, when the rioters were indicted, he was examined concerning those women, and (having been tampered with in their favour,) he then swore that they were not in the riot. There was no evidence on the trial of the defendant for this perjury to prove that the women were in the riot, (which was the perjury assigned,) but the defendant's own original information on oath being produced and read, whereby he had sworn they were in the riot,

1822.

Wednesday,
June 26th.

WOODS and Another, Assignees of ALEXANDER
PATON, a Bankrupt, against RUSSELL.

A. a ship-builder, contracted with *B.* to build a ship for him, and to complete her in April, 1819.

The latter was to pay for her by four instalments: the first when the keel was laid, the second when at the light plank, and the third and fourth when the ship was launched. Before the 25th of June, 1819, the ship was measured with the builder's privity, to the

intent that *B.* might get her registered in his name. On the 25th of June the ship-builder signed the usual certificate of her building; and on the 26th the ship was registered in *B.*'s name; and on the same day the third instalment was paid. On the 30th of June *A.* committed an act of bankruptcy, upon which a commission afterwards issued. On the 2d of July, the ship not being then completed, or launched, the defendant, and a crew hired by him, took possession of her, and a rudder and cordage, the former of which was made by the ship-builder, and the latter bought by him, for the express purpose of completing the ship: Held, first, that the legal effect of the ship-builder's having signed the certificate to enable *B.* to have the ship registered in his name, was to vest the general property in the ship in *B.* from the time the registry was completed:

Held, secondly, that as the rudder and cordage were made and bought by the ship-builder specifically for the ship, they were to be considered as parts of the ship, and that the property in them also vested in *B.*

Held, thirdly, that the property was not in the possession of the bankrupt as reputed owner, within 21 Jac. 1. c. 19.

Held, fourthly, that although the general property in the ship was vested in *B.*, yet as *A.* had not parted with the possession, and, as he would have had a lien upon the ship for the amount of the fourth instalment, if he had completed it; that the taking possession of the ship by *B.* without tendering the amount of the fourth instalment, or so much thereof as was due, provided any thing was due, was wrongful, and consequently that the assignees of *A.* were entitled to recover from *B.* the amount of the fourth instalment, provided the expence necessary for the completion of the ship did not amount to that sum, or so much thereof as would remain due after defraying such expence.

THIS case was tried before Bayley J., at the Summer assizes, 1820, and came on for argument in the course of Easter term, upon a special case, which it is unnecessary to set out, as the facts are fully stated in the judgment delivered by the Court. The case was argued by

Littledale, for the plaintiffs. The property in the ship, rudder, and cordage, continued in *Paton* at the time when he committed the act of bankruptcy, the ship not being then completed. The case of *Mucklow v. Mangles (a)* is an authority expressly in point. There the bankrupt, a barge-builder, had undertaken to build

(a) 1 Taunt. 318.

a barge for *Pocock*, and the latter had paid the whole value in advance, and his name was actually painted on the stern of the vessel after the completion of the work; but before delivery, and before any commission of bankrupt had issued against the barge-builder, the barge was seized in execution for a debt of the bankrupt. It was held, that no property in the barge passed to *Pocock* until its completion and delivery, and consequently that the assignees were entitled to recover the value. Here, the bankrupt was only under a contract to deliver the ship, and although the stipulated time for building had actually elapsed, yet the vessel was not completed and launched until after the act of bankruptcy. The certificate under 26 G. 3. c. 60. s. 12. clearly is not to be given till the ship is completed, and until that time, therefore, no property passes to the vendee, *Groves v. Buck* (a), *Towers v. Osborne*. (b) But at all events, the case falls within the statute of *James*, for the ship was in the hands of the bankrupt as the reputed owner, *Hay v. Fairbairn* (c), *Robinson v. M'Donnell*. (d)

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Woods
against
Russell.

Holt, contra. There are two questions in this case; first, whether the property in the ship, rudder, and cordage, ever passed to the defendant; and, secondly, assuming that it did, whether it continued in the possession of the bankrupt at the time of the act of bankruptcy, as the reputed owner, with the consent of the true owner, within the statute of *James*. Here the property passed to the defendant under the contract, for there was a delivery to him before the 30th June. The

(a) 3 M. & S. 178.

(c) 2 B. & A. 193.

(b) 1 Str. 506.

(d) 2 B. & A. 134.

vessel

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against
RUSSELL.

vessel was clearly completed when she was capable of being surveyed and measured. The officers of the customs had taken the usual bond from the master previously to the bankruptcy; the builder, too, on the 26th June, had given the defendant the certificate required by the 26 G. 3. c. 60. s. 20., and from that time he must be taken to have consented that the defendant should have the possession. Secondly, assuming the property to have passed to the defendant, it did not continue, with his consent, in the possession of the bankrupt as reputed owner. That is a question of fact, which ought to have been found; *Muller v. Moss* (a), and *Oliver v. Bartlett*. (b) Besides, the circumstance of the vessel's having been registered in the name of the defendant, and of his having advertised her for freight, afford the strongest evidence that he, and not the bankrupt, was the reputed owner of the ship.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court.

This was an action of trover for a ship, rudder, and cordage, by the assignees of *Alexander Paton*, a bankrupt, and the facts were shortly as follows: *Paton* was a ship-builder, and in October, 1818, he entered into a written contract with the defendant to build and complete a ship for the defendant, and finish and launch her in April, 1819; and the defendant was to pay for the ship by four instalments of 750*l.* each; the first when the keel was laid, the second when they were at the light plank, and the third and fourth when the ship was

(a) 1 M. & S. 338.

(b) 5 B. Moore, 597.

launched.

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 against
 Russell.

launched. The payments were to be made by bills at two, four, six, and eight months. The first and second instalments were duly paid. In *March*, 1819, the defendant appointed a master, who, from that time, superintended the building. In *May*, 1819, the defendant advertised the ship for charter, and on the 16th of *June* chartered her, with *Paton's* privity, for a voyage from *Newcastle to Newfoundland*. Before the 26th of *June* the ship was measured and surveyed, with *Paton's* privity, to the intent that the defendant might get her registered in his name. On the 19th *June* the master entered into the usual bond for delivering up the register; on the 25th *Paton* signed the usual certificate of her build, &c., and on the 26th the ship was registered in the defendant's name. On that day the defendant paid *Paton* the third instalment. *Paton's* certificate described the ship as launched, but that was not the case, and *Paton's* people continued working upon her, and using his timber and materials till the 3d of *July*. One of the master's apprentices was employed on board by his directions from the early part of *June*, and on the 30th the master ordered him to sleep on board; but on that same day *Paton* committed an act of bankruptcy, upon which a commission afterwards issued. On the 2d of *July* the defendant and a crew he had hired took possession of the ship, and his servants, by his direction, took from *Paton's* yard and warehouse a rudder and cordage, which *Paton* had bought for the ship. On the 4th of *July* the ship was launched. The fourth instalment was never paid. The ship was incomplete when the act of bankruptcy was committed, and the expence of launching her was borne by the defendant. Upon these facts, the questions proposed to the consideration of the Court were, whether the plaintiffs were entitled

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Woods
against
RUSSELL.

to recover the value of the ship, in which case the value, subject to a deduction, was to be taken at 3000/; or, if not, whether they were entitled to recover the value of the rudder and cordage; and, should the Court be of opinion that they were entitled to neither, a nonsuit was to be entered; and upon these points alone the case was argued before the Court. It has occurred, however, to the Court, that a third question arises upon the facts, which neither party could have intended to exclude, which is this: whether, if the plaintiffs are not entitled to recover the whole value of the ship, they may not be entitled to recover to the extent of so much of the fourth instalment as, if the defendant has the ship, he ought to pay. And, upon the first and second questions, our opinion is in favour of the defendant; upon the last, against him. This ship is built upon a special contract, and it is part of the terms of the contract, that given portions of the price shall be paid according to the progress of the work; part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that, as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other. But this case does not depend merely upon the payment of the instalments; so that we are not called upon to decide how far that payment vests the property in the defendant, because, here, *Paton* signed the certificate to enable the defendant to have the ship registered in his (the defendant's) name, and by that act consented, as it seems to us, that the general property in the ship should be considered from that time as being in

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WOODS
against
RUSSELL.

in the defendant. The defendant had, at that time, paid half what the ship, when complete, would be worth. *Paton* could not be injured by having the general property in the ship considered as vested in the defendant, because he would still have a lien upon the possession for the residue of the price; and we think the legal effect of signing the certificate for the purpose of having the ship registered was, from the time the registry was complete, to vest the general property in the defendant. In order to register the ship in the defendant's name, an oath would be requisite that the defendant was the owner, and when *Paton* concurred in what he knew was to lead to that oath, must he not be taken to have consented that the ownership should really be as that oath described it to be? The case of *Mitchell v. Mangles*, 1 *Tunst.* 318. seems to us to be clearly distinguishable from the present, because the bargain there for building the barge does not appear to have stipulated for the advances which were made, and those advances do not appear to have been regulated by the progress of the work. Mr. Justice *Heath's* opinion appears to have been founded on the notion that the builder was not tied down to deliver that specific barge, but would have been at full liberty to have substituted any other he was building; and the builder had done no act expressing an unequivocal consent that the general property should be considered vested in the purchaser. The painting of the name upon the stern, the only act there, pledged the builder to nothing; it expressed an intention that the barge should be *Poore's*, but it did no more. He might change that intention and obliterate the name. But the signing of the certificate, here, to the intent that the defendant might obtain a registry in his own name, was a consent that what was

1832,

Winn
against
Rumell.

necessary to enable the defendant to obtain such registry should, as between them, be considered as complete, and that, as the defendant would have to swear that he was sole owner of the ship, the ownership should be considered his. We are, therefore, of opinion, that the assignees, who claim under *Paton*, are bound equally with him; and, as this is not a case within the statute of *James*, the plaintiffs are not entitled to recover the general value of the ship. And as to the rudder and cordage, as they were bought by *Paton* specifically for this ship, though they were not actually attached to it at the time his act of bankruptcy was committed, they seem to us to stand upon the same footing with the ship, and that, if the defendant was entitled to take the ship, he was also entitled to take the rudder and cordage as parts thereof. Upon the last question, however, we are of opinion against the defendant. Though the general ownership was vested in the defendant, the possession remained with *Paton*; and as the bills for the third and fourth instalments were to be given at the launching of the ship (when launched), *Paton*, had he completed the ship, would have had a lien upon it till those bills were given; and as the defendant thought fit to take the ship before it was complete, after having given bills for the first three instalments only, we think he ought to have given a bill for so much of the fourth instalment as, according to the value of what remained to be done, *Paton* was entitled to receive; and that, unless what remained to be done would be equal to the whole of the fourth instalment, his taking the ship, without giving or tendering such a bill, was a wrongful taking. We are, therefore, of opinion, that, according to the provision made in that respect in the case, it ought to be referred to Mr. Rainbridge and Mr. Clayton, and such thing as

son as they shall appoint, to take an account of the want of materials stipulated to be provided by *Paton* not on board, and the fair expence of launching, and to enter the verdict accordingly. If the want of materials, and the expence of launching, shall amount to 750*l.*, the verdict to be entered for the defendant; if it shall amount to less than 750*l.*, a verdict for the difference to be entered for the plaintiff.

Judgment accordingly.

APOTHECARIES' Company *against* ROBY.

Wednesday,
June 26th.

THIS case was argued in the course of this term by *Scarlett*, *Gurney*, and *Campbell* for the plaintiffs, and by *Denman* and *Chitty* for the defendant. The facts of the case and the arguments addressed to the courts, are fully stated and observed upon by the Lord Chief Justice in delivering the judgment of the Court, and it is therefore unnecessary to state them here.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This was an action for a penalty on the statute 55 G. 3. c. 194., for practising as an apothecary without having obtained the certificate required by that act, which received the royal assent on the 12th July, 1815. At the trial before me, some evidence was offered on the part of the defendant, to shew that he had been practising as an apothecary in town, in June, and some part of July, 1815, including the 12th of July in that

By the 55 G. 3. c. 194. s. 14. it is enacted, "that from and after the 1st day of August, 1815, it shall not be lawful for any person (except persons already in practice as such) to practise as an apothecary, unless he take out a certificate," &c. By section 20, "if any person (except such as are then actually practising as such) shall, after the said 1st day of August, 1815, act or practise as an apothecary without having obtained such certificate, every person so offending shall forfeit 20*l.*." Held, in an

action for the penalty, that it was not sufficient for the defendant, in order to bring himself within the exception, to shew that previously to and on the 12th of July, 1815, (when the act received the royal assent,) he was practising as an apothecary, but that it was necessary to shew that he was so practising on the 1st of August, 1815.

1822.

*APOTHECARIES
Company
against
Rox.*

year; but as the evidence, such as it was, did not extend to the first day of *August*, the defendant having before that day left town, and become an assistant to an apothecary at *Chatham*; and, as I was of opinion, that no person was exempt from this penalty, who was not in practice as an apothecary, on the 1st of *August*; the jury under my direction in that respect, found their verdict for the plaintiffs. A rule to shew cause why there should not be a new trial was obtained, and upon shewing cause it was contended by the plaintiff, first, that the direction was right in point of law; and if not so, then secondly, that there was no evidence that the defendant had at any time practised as an apothecary within the meaning of this statute. It is not necessary to give any opinion upon the latter point, because we are all of opinion that the direction was right in point of law. The statute was passed as I have before observed, on the 12th of July, 1815, but it may be said generally to take its effect from the first of *August* following.

The great object of the statute, as appears by the preamble to the 7th section, was to prevent danger to the health and lives of the king's subjects by ignorant and incompetent practitioners. For this purpose provisions were made regarding two classes of persons, viz. persons practising as apothecaries, and persons acting as assistants to apothecaries. It would be known to the legislature, that some persons would be found engaged in each of those branches at the time (whatever that should be) at which the penalties imposed by the act might be made to take effect, and it was reasonable that some at least of such persons should be exempted from its enactment; and we are to learn from the language of the statute, what is the precise time at which a

person must have been so engaged in order to be thus exempted.

1822.

APOTHECARIES'
Company
against
Rogers

There are five sections in which the time is mentioned, viz. the 14th, 17th, 20th, 21st, and 29th. The 14th regards apothecaries, and is a prohibitory clause, and it runs thus, "from and after the first of *August*, it shall not be lawful for any person or persons (except persons *already* in practice as such,) to practice as an apothecary, unless," &c. Now the word "*already*" as here used is of doubtful import, it may either relate to the first of *August* or to the passing of the act. The 17th section relates to assistants, and is the prohibitory clause as to them; and it is thus, "from and after the first of *August*, it shall not be lawful for any person or persons, (except the persons *then* acting as assistants,) and except those who have served an apprenticeship, to act as an assistant." In this clause there is no ambiguity, the word "*then*," plainly and obviously refers to the first of *August*.

The 20th section is the penal clause; it embraces both the classes, viz. apothecaries and assistants, with a difference however as to the amount of the penalty; and it is thus, "if any person (except such as are *then* actually practising as such,) shall after the first of *August*, act or practise as an apothecary without, &c. he shall forfeit 20*l*. And if any person, except such as are *then* acting as such, and except those who have served an apprenticeship, shall after the first day of *August*, act as an assistant, he shall forfeit 5*l*."

In this clause also taken by itself, there is no ambiguity, the word *then* plainly refers to the first of *August*. And this seems to indicate, that the word *already*, as used in the 14th section, is there used to

1882;

APOTHECARY
Company
against
Hays.

denote the same day, unless it was intended that an apothecary should be exempt from the penalty, who was not actually in practice both on the 12th of July and the first of August.

The 21st and 29th sections speak of apothecaries only, and do not mention assistants to apothecaries.

The 21st section relates to the recovery of charges, and it is thus: "no apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall prove at the trial that he was in practice prior to or on the first of August, or that he has obtained a certificate," &c. Now, it was well observed by Mr. Campbell, that this clause relates only to the proof to be given at the trial, and the legislature might not think it expedient to require proof of the precise day, which might lead to questions as to actual employment and practice on that day, but might reasonably conclude, that he who could prove himself to be in practice before the first of August, and was in practice, and claimed charges for practice after that day, was really in practice on that day. We, therefore, do not see any thing in this section that may reasonably control the plain language of the 29th section, and it is not necessary to say, whether the word *or*, ought in this 21st section to be read as *and*, which has been the construction put on that word in some other statutes, and which may perhaps be its proper construction in this place. The only remaining section to be noticed is the 29th, the general saving clause. It enacts, that the act shall not lessen, prejudice, or defeat the rights, authorities, privileges and immunities, vested in and exercised, and enjoyed by either of the two Universities of Oxford and Cambridge, the royal college of physicians, the

the royal college of surgeons, or the said society of apothecaries, except such as have been altered, varied or amended by the act, or of any person or persons practising as an apothecary previously to the first of August; but the said universities, colleges, and persons, shall have, &c. all such rights, &c. save and except as aforesaid, in as beneficial a manner as they might have done if the act had not been passed.

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Company
against
Rest.

Now, if the words previously to the first of August are to be taken in their large and unqualified sense, this saving clause will be quite irreconcilable with the 14th section, whether the word "*already*" there used be referred to the day of the passing of the act, or to the first of August, and also with the 20th section, which plainly mentions the first of August, and the inquiry in any proceeding on the statute may always be, not whether the party was in practice on the 12th July or on the first of August, but whether he had been in practice at any remote period of his life. It is impossible to suppose that this was intended, and it seems to us, that the only mode of reconciling all the clauses and carrying the plain object of the law into effect, is to consider those apothecaries only to be exempt from its provisions who were in practice on the day on which the act took effect, that is, the first of August. This construction is not inconsistent with the words of this clause, for the clause contains only a saving of the rights of those persons who were in practice before the first of August, except as altered or varied by the act, and that alteration is to be found in the 20th section, which imposes the penalties on persons not in practice on the first of August. It is not necessary, as I have before observed, to say in this case, whether a person claiming the exemption

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Company
against
Rost.

emption must have been in practice both before and on the first of August. If the meaning of this saving clause be doubtful, then, according to all sound rules of construction, the plain sense of the penal clause must prevail. Attending to all the parts of this saving clause, it appears to have been introduced ex majori cautela, and not intended to controul any previous enactments; we think the language of it too doubtful to have the effect of controuling the plain words of the penal clause, and we are consequently of opinion, that the direction at the trial was right; and that the rule for a new trial must be discharged.

Rule discharged.

Wednesday,
June 26th.

GILPIN against ENDERBEY, (in Error.)

By deed A. and B. covenanted to become partners in the business of army clothiers for ten years; and that A. should advance 20,000*l.* as part of the capital for carrying on the business, and that B. should find a like sum; that

A., during the continuance of the partnership, should have out of the profits, if sufficient, or if not, out of the capital, 2000*l.* yearly for his share of the profits. But the covenant was that on the determination of the partnership by effluxion of time, the sum of 20,000*l.* should be repaid to A.; that B. should guarantee all debts and pay all losses. An action brought upon this deed to recover the 20,000*l.* at the expiration of the ten years, the defendant pleaded that the deed was executed, by way of sham, for the purpose of an usurious agreement. That plea, upon issues joined, was negatived by the verdict of the jury, and judgment was given by the Court of C. B. for the plaintiff. Held, upon error in K. B., that after that finding, the deed must be taken to disclose the real intention of the parties, and that it was not in that case void upon the ground of usury.

Trust

trust and confidence which the said plaintiff and defendant reposed in each other; and in consideration of the covenants and agreements in the said indenture after contained to be entered into by them mutually and reciprocally with each other; each of them, the plaintiff and the defendant, did by that indenture covenant with the other of them in manner following: viz. that they, the plaintiff and defendant, should become partners in the business of an army clothier for the term of ten years; and that defendant should advance 20,000*l.* as part of the capital for carrying on the business; and that defendant having accordingly advanced the sum of 20,000*l.* immediately before the execution of the indenture, the residue of the capital should be provided by plaintiff, *Gilpin*, or by him and such additional partner as in the said indenture mentioned, and should be equal to at least 20,000*l.*; and further, that during the continuance of the partnership, *Enderbey* should be entitled to have out of the profits of the said trade, (and in case of any deficiency therein, then out of the capital thereof) by half yearly portions a certain sum of money therein mentioned, viz. 2000*l.* per annum, as for his full dividend or share of the profits or produce of said trade; and that all the residue of the profits of the trade in each half year during the partnership, should, on the days in that behalf mentioned, and also on the determination of the partnership, belong to, and be the sole property of, and be had, received, and taken by *Gilpin*, as and for his share of the profits of the said partnership. And the said plaintiff, *Gilpin*, by the indenture further covenanted with the defendant, that on the determination of the partnership by effluxion of time, the said sum of 20,000*l.* should be repaid to the defendant, *Enderbey*,

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Guernsey
against
Enderbey
1822

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 Gilpin
 against
 Enderbey.

derby, his executors, &c. by six equal instalments, to be computed from the determination of the partnership, and each instalment to be paid at the end of each three calendar months, and interest at the rate of 5% per annum for 100*l.*, to be computed from the determination of the said partnership. Breach, non-payment of the 20,000*l.*, together with 3000*l.* for interest on the expiration of the partnership.

The defendant craved oyer of the deed which was set out, and which contained the following covenants besides those set out in the declaration: viz. that the business should be carried on in the name of *Gilpin* only, or in the names of him and another person who should be admitted into the partnership pursuant to the provisions for that purpose in the deed; and that it should be under the sole direction and controul of *Gilpin* or such other partner; and that *Gilpin* and such partner should undertake the management of the business without any compensation to be made to them on that account; that *Gilpin* should hire servants and pay their wages out of the profits of the business; that he should keep the books of accounts, which should be open to the inspection of *Enderbey*, and that he should once every year deliver a balance sheet to him; that all debts and expences contracted in the trade, and that all losses either by bad debts, decay of goods, suits, or other casualties, and all servants' wages and other necessary expences, and the property tax payable in respect of the profits, should be paid out of the partnership stock and effects, including the sum of 20,000*l.*; that *Gilpin* should pay out of the stock or capital of the partnership, all such losses as should from time to time arise in carrying on the business, and guarantee the payment of

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all debts which should be due to the partnership; that neither of the parties should become surety during the continuance of the partnership, or compound or release debts, &c. &c.; that in case *Gilpin* should depart this life at any time before the expiration of ten years, and his executors should refuse to carry on the partnership, they should have power to determine it on giving three months' notice to *Enderbey*, and on paying out of the partnership money and effects, the sum of 20,000*l.* advanced to the capital of the partnership; and such further sum as should be a proportional part of the sum of 2000*l.* for *Enderbey's* share of the profits; that on the determination of the partnership by effluxion of time, in case it should so determine, a sufficient part of all the debts due or owing to the partnership, should be fully repaid to *Enderbey* by six equal instalments, to be computed from the determination of the partnership; that in case at any time during the partnership, the value of the partnership effects should be reduced to the sum of 20,000*l.*, or in case either of the parties should become bankrupt, or depart the realm, or do several other acts therein named, it should be lawful to determine the partnership by notice; and that in case *Gilpin* should refuse to keep the accounts, or to render a statement, or deny the perusal of the books to *Enderbey*, that *E.* might upon one month's notice dissolve and determine the partnership, and that the sum of 20,000*l.* should be payable forthwith from the expiration of the notice. Covenant to refer differences to arbitration and other usual covenants. The defendant then pleaded, that before the making of the indenture, to wit, on, &c. at, &c. it was corruptly and against the form of the statute agreed between the plaintiff and defendant, that

the

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 Courts
 against
 Embezzlers.

the plaintiff should lend and advance to the defendant the sum of 20,000*l.*, and that the plaintiff should forbear and give day of payment thereof to the said defendant for the space of ten years thence next ensuing; and that the defendant, for the loan of the said sum of 20,000*l.*, and for the forbearing and giving day of payment thereof, should yearly, during the said term of ten years, pay to the plaintiff the sum of 2000*l.*, by equal half yearly portions, on the 24th March and 24th September in each year; and that, for securing the repayment of the sum of 20,000*l.* with such payments half yearly to the plaintiff; the plaintiff and defendant, by way of shift, should execute a certain instrument in the form of a deed of partnership, according to the form and effect of the indenture in the declaration mentioned. And that, in pursuance of said corrupt and unlawful agreement so made, the plaintiff afterwards, to wit, on, &c. at, &c. aforesaid, lent and advanced to the defendant the said sum of 20,000*l.* on the terms aforesaid; and that for securing the payment thereof, with such payments half yearly as aforesaid; the plaintiff and the defendant by way of shift afterwards, to wit, on, &c. at, &c. executed the indenture in the declaration mentioned; and the plaintiff then and there accepted of and from the defendant, the said part of the supposed indenture, so by him produced in Court as aforesaid, in pursuance of said corrupt and unlawful agreement, and for the purposes aforesaid. And the defendant avers, that the sum of 2000*l.* so to be paid yearly for the loan of said 20,000*l.* exceeds the rate of 5*l.* per cent. contrary to the form of statute. Whereby the said indenture was and is wholly void in law; and this, &c. Replication, that the plaintiff and the defendant, executed the

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against
Evidence

the indictment in the declaration mentioned for good and lawful considerations, and not by way of shift or in pursuance of, or upon the said corrupt and unlawful agreement, or for the purpose in the said plea of defendant mentioned, in manner and form as defendant hath in his plea alleged. And this the plaintiff prays may be enquired of by the country, &c. And the defendant doth the like. The jury found a verdict upon the issues joined on the plea in favour of the plaintiff below, thereby negating the corrupt agreement. And the Court of Common Pleas gave judgment for the plaintiff below. The record having been removed into this Court upon a writ of error. The case was argued on a former day in this term, by

Campbell, for the plaintiff in error. This deed is unavailing on the face of it, and, although the issues on the pleas were found in favour of the plaintiff below, yet the case is now to be considered as if the deed had been merely set out upon oyer, and the defendant below had demurred. This case is distinguishable from *Danda vs Carter* (a), for there the usury did not appear on the face of the declaration. Here, the principal was never in hazard; for if the entire capital had been lost in the course of carrying on the trade, *Endrby* might still have maintained an action to recover his principal at the end of ten years. If, therefore, at the commencement of the partnership, *Gilpin* was possessed of property to the amount of 100,000*l.*, and the losses of the trade exceeded the 40,000*l.*, which was the entire capital embarked in it, still *Gilpin* would be liable to make good,

(a) *Siderfin*, 265.

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out of his entire fortune, the 20,000*l.* at the end of the ten years; for there is an express stipulation that all losses shall be borne by *Gilpin*. This, therefore, was a mere loan to *Gilpin* of 20,000*l.*, for which the lender was to receive more than 5*l.* per cent. interest. If this be an absolute covenant to repay the 20,000*l.*, with the stipulated interest, the deed is usurious. If, on the other hand, the covenant be conditional, to repay the 20,000*l.* if the profits and capital remaining at the end of ten years are sufficient for that purpose, then the declaration is defective, because it does not contain any averment that the profits and capital were sufficient. In *Morse v. Wilson* (b) it was expressly decided, that if the borrower of money give a bond for the principal and interest at 5*l.* per cent., and covenant at the same time also to pay to the lender a certain portion of the profits of a trade carried on by him in partnership with another person, that is an usurious contract, and the obligee cannot recover on the bond.

Parke, contra. In order to constitute usury, there must be a loan of money. Here there was no loan of money to *Gilpin*. The deed does not even state that the money was advanced to him, but merely that the parties had agreed to become partners for ten years, and that *Enderbey* should advance 20,000*l.* as part of the capital for carrying on the business. *Gilpin* did not acquire the whole interest in the sum so advanced, but *Enderbey* had a joint interest in it with *Gilpin*. Besides,

(a) 4 T. R. 353.

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the jury have found as a fact that this was a bonâ fide partnership. *Hammett v. Yea* (a), *Masterman v. Cowrie* (b), *Barclay v. Walmesley* (c), *Doe d. Metcalf v. Brown* (d), *Yeoman v. Barstow* (e), are authorities to shew that there must be an actual loan of money to constitute usury, and that there may be cases where more than 5l. per cent. is taken for the use of money, and where the principal is not even put in hazard, where the offence of usury is not committed. The case of *Morse v. Wilson* is distinguishable, because there, there was an actual loan of money. Here there was no loan, but an advance of money for the purpose of carrying on the trade.

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against
ENDRUMPT.

Campbell in reply. In the cases cited, no money passed from one party to the other. In *Yeoman v. Barstow* the contract did not appear upon the face of the declaration to be usurious; for it was a contract for old hammered silver, which cannot be considered money. Besides, the authority of that case is much shaken by what fell from Lord *Alvanley* in *Marsh v. Martindale* (f), and Mr. *Comyn* in his *Treatise on Usury*, p. 101., states that case to be at variance with all the other decisions.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This case was argued before us a few days ago. It is a writ of error, brought on a judgment of the

(a) 1 Bos. & Pul. 153.

(c) 4 East, 55.

(e) Lutw. 273.

(b) 3 Campb. 498.

(d) Holt's N. P. Rep. 295.

(f) 3 Bos. & Pul. 154.

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Court of Common Pleas, in an action of covenant on an indenture, bearing date the 24th of *September*, 1807. To this action *Gilpin*, the defendant below, pleaded several pleas of the statute of usury, upon which issues were joined, and found against him, and judgment given for *Enderbey*, the plaintiff below. The indenture is set forth at large upon the record, and the ground of the writ of error was, that this indenture manifestly exhibits a case of usury within the statute, and ought, consequently, to be pronounced void in law. The particulars of the deed were so recently adverted to in the argument that a very concise notice of them will be sufficient. The indenture professes to be a deed of partnership between these parties for ten years. The counsel on both sides agreed that, by the effect of this deed, *Gilpin* covenants absolutely that *Enderbey* shall, at the expiration of the ten years, receive the 20,000*l.* therein said to have been advanced by *Enderbey* for carrying on the trade, whether the stock and capital of the partnership may at that time be sufficient or insufficient for that purpose. The Court adopts this construction thus agreed upon for the purpose of its present judgment. Indeed the plaintiff below cannot maintain this action upon any other supposition, because he has not averred a sufficiency of stock or capital to answer the whole or any part of the 20,000*l.* claimed, and the defendant below builds his argument of usury mainly on this foundation. According to the contents of this deed, *Gilpin* was carrying on the business of an army-clothier, &c. The parties agree to become partners in that business for ten years. *Enderbey* advances 20,000*l.*, as part of the capital for carrying on the business, and *Gilpin* covenants that the residue of the capital shall be provided

provided by him to the amount of at least 20,000*l*. *Gilpin* is to conduct the trade in his own name, and *Enderbey* is not to be required to interfere. *Enderbey*, during the continuance of the partnership, is to take out of the profits, or, if they be insufficient, then out of the capital 2000*l*. per annum, as and for his share of the profits. *Gilpin* is to pay into the partnership stock all such losses as may arise in carrying on the trade, and to guarantee the payment of all debts that may be owing to the partnership; and at the end of the ten years, if he be then living, *Enderbey* is to have back his 20,000*l*. as before mentioned. If the partnership effects, stock, debts, and credits, be at any time reduced to 20,000*l*., the partnership may be dissolved.

There are clauses for keeping and exhibiting regular accounts, for referring disputes to arbitration, and several others usual in partnership deeds.

By the execution of this deed, *Enderbey* undoubtedly made himself answerable as a partner to all strangers, though he might not be answerable as between himself and *Gilpin*. And if the deed discloses the real facts, and the intention of the parties to it, this is not the case of a loan of money by *Enderbey* to *Gilpin*, but a contract of partnership between them of a peculiar kind. If the deed does not disclose the real facts and the intention of the parties, but was executed only as a contrivance to cover a loan of 20,000*l*. for ten years, at 10*l*. per cent., the deed was undoubtedly void; but this is a fact that ought to have been found affirmatively by a jury, to enable the Court thereupon to declare the deed void. No such fact has been found, and, in the absence of such a finding, we must consider the deed as speaking the language of truth. And, so considering it, we

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cannot pronounce it to be void. The partnership, as constituted by this deed, may be, and probably is, of an unusual kind: but that circumstance will not authorise us to say that there was in truth no partnership; and if there was a partnership, there is no loan of money by *Enderbey* to *Gilpin*, and no usury. Unusual as such a partnership may be, it is by no means impossible. A man carrying on trade with a capital of 20,000*l.* might have made a profit of 3000*l.* a-year, and might really think and expect, (though I cannot say that, in my opinion, such an expectation was likely to be realized,) that if the capital were doubled, the clear profits would be doubled also, and might, on such an expectation, engage that any person who would bring 20,000*l.* should receive 2000*l.* per annum, which would leave 4000*l.* for himself; and so be, in his estimation, a very good bargain. Some such opinion may have produced the contract between these parties. We must take their contract from the deed, and so taking it, we cannot pronounce it to be usurious. The judgment, therefore, must be affirmed.

Judgment affirmed.

PHILIPS *against* SHAW.

IN this case, Vol. IV. p. 435., it ought to have been stated that there were two counts in the declaration; in the latter of which the *pro ut patet per recordum* was omitted; and that the verdict was taken upon the latter count only.

END OF TRINITY TERM.

AN INDEX TO THE PRINCIPAL MATTERS.

ACTION ON THE CASE.

1. An action at common law will not lie for disturbing another in the possession of a pew, unless the pew be annexed to a house in the parish. *Mainwaring v. Giles*, H. 2 and 3 G. 4. Page 356
2. An action lies for the malicious prosecution of a bad indictment for perjury. *Pippett v. Hearn*, E. 3 G. 4. 634

ACCEPTANCE.

See FRAUDS, STATUTE OF, 2. 5.

ADMINISTRATOR.

In an action by an administrator upon a bill of exchange, payable to the intestate, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing.

An agent, having money in his hands belonging to his principal, purchases with it a bill of exchange,

which he indorses specially to his principal; the latter, at the time of the indorsement, was dead, but that fact was not known to the agent: Held, that the property in the bill passed to the administrator of the principal, and that he might, therefore, sue upon the bill in that character: Held, also, that the administrator was only entitled to recover interest upon bills accepted after the death of the testator from the time of demand of payment made by the administrator, &c. not from the time the bills became due.

Where the declaration stated the drawing of certain bills of exchange, and their acceptance after the death of the intestate, the granting of the letters of administration to the plaintiff, the defendants' liability, &c.; and the defendants pleaded that the cause of action did not accrue within six years, to which the plaintiff replied generally, that it did accrue within six years: It was held that the replication was good. *Murray, Administrator, v. The East India Company*, M. 2 G. 4. Page 204

ADVOWSON.

A bond was conditioned for the resignation of a living, which the defendant, when requested, had refused to resign: Held, that he being a wrong doer, the jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff by the defendant's life-interest; nor in estimating the annual proceeds, to deduct the curate's stipend. *Lord Sondes v. Fletcher*, T. 3 G. 4.

Page 835

AMENDMENT.

See PRACTICE, 41.

ANNUITY.

1. By a public act the *Waterloo Bridge Company* were authorised to raise money for the purpose of completing their undertaking, either among themselves or by the admission of new members, or by granting annuities for a term of years or for life. The act did not contain any provision that the annuities should or should not be redeemable. The Company, however, in the original grant, reserved to themselves a power of redemption: Held, under these circumstances, that an auctioneer, putting up to sale one of these annuities, was bound in his particulars of sale to describe it as a redeemable annuity. *Coverley v. Burrell*, M. 2 G. 4. 257

2. By the 53 G. 3. c. 141. the memorial of an annuity must contain the description and place of residence of the witnesses to the annuity deed.

A mere surety who charges with the payment of an annuity his estate in fee simple, of which he was seised in possession at the time of granting the annuity, and which

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was of greater annual value than the annuity, is a grantor within the meaning of the 13 G. 3. c. 26. s. 8., and therefore in such a case no memorial is required. *Darwin v. Lincoln and Another*, H. 2 and 3 G. 4. Page 444

3. Under the 53 G. 3. c. 141. s. 2. it is requisite that the memorial of an annuity should contain the names and places of abode of the witnesses to a warrant of attorney, given as a collateral security; and, therefore, where it was thus stated, *A. B.*, clerk to *J. S.* of *D. Street*, in the county of *M.*, gent.: Held, that this was not sufficient, it appearing that *A. B.* did not reside, but only attended at the office there at the time. *Smith v. Pritchard*, E. 3 G. 4. 717

But see statute 3 Geo. 4. c. 92.

4. The condition of a bond recited that the obligor had cohabited with a woman for several years, and had by her two children therein named, and that she being desirous to put an end to the connexion, had applied to the obligor to make a provision for herself and children, which he had agreed to do; and for that purpose the obligor entered into the bond in question, which was conditioned to pay to the mother yearly, during the joint natural lives of herself and two children, a certain sum therein mentioned; the annuity to be applied to the maintenance and education of the children as well as of herself; or in case of the death of the two children therein specifically named, then the same annuity was to be payable to her during her life. One of the children died during the lifetime of the mother: Held, that the annuity was payable to her during her life, at all events. *James and Wife v. Tallent*, T. 3 G. 4. 889

APOTHE-

APOTHECARIES.

By the 55 G. 3. c. 194. s. 14. it is enacted, "that from and after the 1st day of *August*, 1815, it shall not be lawful for any person (except persons already in practice as such) to practise as an apothecary, unless he take out a certificate, &c. By sect. 20. "if any person (except such as are then actually practising as such) shall, after the said 1st day of *August*, 1815, act or practise as an apothecary without having obtained such certificate, every person so offending shall forfeit 20*l.*: Held, in an action for the penalty, that it was not sufficient for the defendant, in order to bring himself within the exception, to shew that previously to and on the 12th of *July*, 1815, (when the act received the royal assent, he was practising as an apothecary,) but that it was necessary to shew that he was so practising on the 1st of *August*, 1815. *The Apothecaries' Company v. Roby*, T. 3 G. 4. Page 949

APPEAL.

1. An order of removal was dated the 1st of *August*, 1814, and an order of suspension indorsed thereon, in consequence of the sickness of the pauper; and a copy of such order and indorsement was, in 1814, served upon the appellants, but the original order not produced at the time of serving such copy; and subsequently, in 1815, another part of the order and indorsement, executed by the same justices, but bearing date in *August*, 1814, was served upon the appellants. The pauper was not removed till 1819, when an appeal was duly entered: Held, that the services of the original order of removal in 1814 and 1815 were both defective, and that the ap-

peal was made in time, notwithstanding 49 G. 3. c. 124. s. 2. *Rex v. Inhabitants of Alnwick*, M. 2 G. 4. Page 184

2. By a clause in an inclosure act, a commissioner was authorised to stop up any way, provided it be done by the order, and with the concurrence of two justices, and that order was to be subject to an appeal in like manner, and under such form and restrictions as if the same had been originally made by such justices. By a subsequent clause, any party aggrieved was to be at liberty to appeal at any time within six months after the cause of complaint. Under this act the commissioners, with the concurrence and order of two justices, stopped up a road, without giving the public notices required by the 55 G. 3. c. 68.: Held, that a party aggrieved might, under these circumstances, appeal at any time within six months. Quere, whether it be necessary to give such notices where roads are stopped up under the provisions of an inclosure act. *Rex v. Townsend*, H. 2 and 3 G. 4. 420

3. Where an order of removal has been executed, and by consent of the removing parish and the magistrates making it, it is superseded, and the paupers taken back, it is in the discretion of the sessions to enter an appeal against it or not, according as they may think that justice requires it, in order to compel the respondents to pay the costs of maintenance, &c. incurred by the appellants before the order was superseded. *Rex v. The Justices of Norfolk*, H. 2 and 3 G. 4. 484

4. The 18 G. 3. c. 19. s. 5. gives an appeal only in case the majority of overseers concur in it. *Rex v. Justices of Lancashire*, E. 3 G. 4. 755

APPEAL, (*Notice of*)

1. It is not necessary, in order to give the justices at sessions jurisdiction to hear an appeal against overseers' accounts, that such accounts should previously have been examined and allowed, pursuant to 50 G. 3. c. 49. *Rex v. The Justices of Colchester*, H. 2 and 3 G. 4. Page 535
2. Where a statute gives an appeal, the appellant giving reasonable notice to the other parties, such notice need not be in writing; but a verbal notice, if reasonable as to time, is sufficient. *Rex v. The Justices of Surrey*, H. 2 and 3 G. 4. 539

APPORTIONMENT.

See LANDLORD AND TENANT, 11.

APPROPRIATION.

See PLEADING, 28.

ARBITRAMENT.

1. A submission to arbitration under 9 and 10 W. 3. c. 15. s. 1. may be made a rule of court in vacation. *In the Matter of Taylor*, M. 2 G. 4. 217
- Declaration stated that defendant covenanted to obey, abide by, and perform an award, and that he would not prevent the arbitrators from making their award. It then stated that the arbitrators made their award, and thereby directed the defendant to pay a certain sum therein mentioned; and alleged as a breach of the covenant, that the defendant did not pay the sum awarded. Plea, that before the award, defendant, by deed revoked the authority of the arbitrators, of which revocation they had notice: Held, upon demurrer, that defendant was entitled to judgment, although it appeared by the plea that he had been guilty

of a breach of the covenant to abide by the award, by revoking the authority of the arbitrators, the plaintiff being entitled to recover damages only in respect of the cause of action stated in his declaration, and not in respect of a cause of action disclosed in the plea.

The second count of the declaration stated the deed of reference, and then averred that defendant did, before the making of the award, hinder and prevent the arbitrators from making their award in this, that the defendant, by a certain deed in writing, signed and sealed by him, after reciting, as was therein recited, did revoke the authority: Held, upon demurrer, that this was an allegation, not of the mere legal effect of the deed, but of the fact of revocation; and that it was unnecessary to state that the arbitrators had notice of the revocation, that being necessarily implied in the averment, that the defendant had revoked the authority. *Mars, Executor of Quinlan, v. Bullock*, H. 2 and 3 G. 4. Page 507

3. Where an action for breach of covenant was pending, and, with all matters in difference, was referred to arbitration, the costs of the suit to abide the event: Held, that an award that the plaintiff had no demand on the defendant on account of any alleged breaches of covenant, or on any other account whatsoever, was final, although the suit was not, in terms, put an end to. *Jackson v. Yabsley*, T. 3 G. 4. 848

ARREST.

1. Where, in the account between plaintiff and defendant, there are items clearly due on both sides, it is an arrest without reasonable and probable cause within 45 G. 3.

ASSIGNMENT.

c. 48. s. 9., if the plaintiff arrests and holds the defendant to bail for the amount due to him, without at the same time giving him credit for the items clearly due on the other side of the account. He ought only to hold the defendant to bail for the admitted balance. *Dronefield v. Archer*, H. 2 and 3 G. 4.

Page 513

2. Where a defendant being previously in custody in execution for a debt, a detainer was lodged against him, but for too large a sum, and on this being discovered in a few hours, the plaintiff discontinued on payment of costs, and before the payment of costs lodged a fresh detainer. Held, that this second detainer was regular, and that it was not like the case of a fresh arrest which cannot be made till the costs have been paid. *White v. Gompertz*, T. T. 3 G. 4. 905

ASSIGNMENT.

1. Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c. and then averred that plaintiff did assign the bill. It appeared, that the parties had agreed that the plaintiff should give up the bill to the defendant; the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff by deed assigned to the defendant, the bill and all sums of money due thereon, to and for the defendant's own use, and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill: Held, that the declaration imported, that the plaintiff had made an absolute assignment of the bill; and consequently, that the assign-

ASSUMPSIT.

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ment in evidence being only conditional, this was a fatal variance. *Vansandau v. Burt*, M. 2 G. 4.

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2. Where there were two assignments of the same lease of premises within the county of *Middlesex*, and that executed last was registered first: Held, that the deed last registered must, in a court of law, be considered as fraudulent and void, in consequence of 7 Ann. c. 20. s. 1., although the party claiming under the second assignment had full knowledge, when it was executed, of the prior execution of the first assignment. *Doe dem. Robinson v. Alsop*, M. 2 G. 4. 142

3. Where an assignment of a lease by deed, taken in execution, was made in the name and under the seal of office of the sheriff, by A. B., acting as under-sheriff: Held, that such assignment was sufficiently proved, without proving further the appointment of A. B. as under-sheriff, and that he had power by deed to execute deeds in the name of the sheriff. *Doe dem. James v. Brown*, M. 2 G. 4. 243

ASSUMPSIT.

See CARRIERS, 1, 2.

1. The giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and therefore, where a ship having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained, agreed, on the owners of the

the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages: Held, that there being contradictory decisions as to the point whether the ship-owners were liable for an injury done while their ship was under the controul of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages.

Longridge and Another v. Darville and Another, M. 2 G. 4. Page 117

2. Assumpsit will lie upon a bill of exchange against a trading corporation whose power of drawing and accepting bills is recognized by statute. *Murray v. The East India Company*, M. 2 G. 4. 204
3. A printer cannot recover for labour or materials used in printing any work, unless he affixes his name to it, pursuant to the 39 G. 3. c. 79. s. 27. *Bensley v. Bignold*, H. 2 and 3 G. 4. 335

ATTACHMENT.

See PRACTICE, 20.

ATTORNEY.

See PRACTICE, 9. 42.

1. Where an attorney, in order to get possession of papers belonging to A. B., in the hands of A. B.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that A. B. should enter into an unqualified reference, not revocable, &c.: Held, that A. B. having become subsequently bankrupt for the second time, and without paying 15s. in the pound, the proof of the debt under the commission was not

an election by the former attorney under 49 G. 8. c. 121. s. 14., so as to dispense with the reference; and that the attorney was liable, pursuant to his undertaking, to procure A. B.'s signature to an agreement of reference, and to find security for the performance of the award to the satisfaction of the Master. *Ex parte Hughes*, H. 2 and 3 G. 4. Page 482

2. A clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the crown: Held, that he could not, within 22 G. 2. c. 46. s. 8. and 10., be considered as serving his whole time and term in the proper business of an attorney; and that he ought not to be admitted on the roll; and that having been admitted, he ought to be struck off. *Ex parte Taylor, Gent. one, &c.* H. 2 and 3 G. 4. 538

3. An attorney brought his action for his bill of costs, and held the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing: Held, that this was a case within the 43 G. 3. c. 46. s. 3.; and that if not within the statute, still the Court, in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances. *Robinson v. Elsam*, E. 3 G. 4. 661

4. Where a bailiff had written to an attorney for writs, which the latter sent without knowing any thing of the parties or circumstances, but the bailiff never represented himself, or had been considered as an attorney, nor looked for any profit upon the law proceedings: Held, that this was not a case within the 22 G. 2. c. 46. s. 11.; but that it was a most improper practice, which the Court, in virtue of its general

general jurisdiction over attornies, would punish severely. *Ex parte Wharton*, T. 3 G. 4. Page 824

AUCTIONEER.

See ANNUITY, 1. FRAUDS, STATUTE OF, 1.

AWARD.

See ARBITRAMENT, 2. 3. TITHE, 2.

BAIL.

See PRACTICE, 6. 9. 17, 18.

BANKERS.

See PLEADING, 28.

BANKRUPT.

1. *A.*, *B.*, and *C.*, entered into a bond to the king, the condition of which was, that *A.*, as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage-coaches. *A.*, as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. *A. sci. fa.* having afterwards issued upon the bond, *B.*, one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt, that *A.* was a person "surety for, or liable for, a debt" of the bankrupt, within the meaning of the 49 G. 3. c. 121. s. 8., and consequently that the latter was pro-

TECTED by his certificate: Held, also, that the general plea of bankruptcy was well pleaded. *Westcott v. Hodges*, M. 2 G. 4.

Page 12

2. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor being also similarly indebted to *J. S.*, sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between *J. S.* and the assignees, *J. S.* allowed credit to them for the price of goods, and he then proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees, afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner. *Hudson v. Granger*, M. 2 G. 4. 27
3. *A.*, a foreign merchant, purchased in his own name, but on account and with the money of *B.*, a British merchant, certain bank shares in the French funds. The latter drew bills upon *A.*, which he accepted, on the security of those shares standing in his name; and these bills were assigned by *B.*, for a valuable consideration, to *C.*, a British subject. Before they became due, *B.* authorised *A.* by letter to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived, *A.* had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; *B.*, also, afterwards became bankrupt. *C.*, by process in the foreign country, attached the bank shares still standing in the name of *A.* for the debts due to him upon the bills; and the Court there decreed that

that the bank shares should be sold, and that the proceeds should be applied, first, to pay a debt due from *B.* to *A.*, and afterwards to retire the bills. Under this decree, *C.* received a certain sum of money on account of the bills: Held, that the assignees of *A.* could not recover back this money as money belonging to *B.* *Cazenove and Another, Assignees of Power and Warwick, Bankrupts, v. Prevost and Others, M. 2 G. 4.*

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4. Declaration upon four bills of exchange. Plea in bar, that defendant was indebted to plaintiffs in diverse large sums of money for goods sold; and that, for securing to the plaintiffs the said several sums of money, defendant, before his bankruptcy, accepted a bill of exchange drawn by the plaintiffs, for and in payment of one of the said several sums of money in which he was so indebted as aforesaid; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums of money, in which he so stood indebted as aforesaid. The plea then stated that defendant had duly become bankrupt; and that the bills of exchange mentioned in the declaration were proveable under the commission; and that the plaintiffs, being creditors of the defendant for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission, and thereby made their election to take the benefit of the commission, not only with respect to the debt so proved, but also as to the bills and debts mentioned in the declaration: Held, upon demurrer, that this plea could not be supported; first, because the proof of a debt under

the commission of bankruptcy cannot be pleaded in bar to an action at law brought for the same debt; secondly, that the election of the creditor to take the benefit of the commission, is confined by the 49 G. 3. c. 121. s. 14. to the debt actually proved, and does not extend to distinct debts ejusdem generis due at the same time. *Harley and Another v. Greenwood, M. 2 G. 4.*

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5. A pawnbroker is a broker within the 5 G. 2. c. 30. s. 39., and therefore subject to the bankrupt laws.

A person who had formerly taken in goods upon pledge, but had ceased to do so, still continuing to sell the unredeemed pledges, thereby carries on the trade of a pawnbroker, and is subject to the bankrupt laws. *Rawlinson v. Pearson and Others, M. 2 G. 4.*

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6. *A.*, spirit merchant, sold to *B.*, a wine merchant, several casks of brandy, some of which, at the time of the sale, were in *A.*'s own vaults, and others in the vaults of a regular warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided, that this sale had taken place; but no notice of such sale had been given to the warehouse-keeper, with whom some of the casks were deposited. *A.* having become bankrupt while the brandies remained where they were originally deposited, it was held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner,

- owner, within the 21 *Jac.* 1. c. 19. *Knowles v. Horsfall and Others*, M. 2 G. 4. Page 134
7. Where a bond was given under 4 G. 3. c. 33. s. 1. by a member of parliament, being a trader, and, after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given: Held, that the bankruptcy and certificate were no discharge to the bond. *Jameson and Another v. Campbell*, M. 2 G. 4. 250
8. A testator devised a copyhold estate to his wife for life, remainder to his son, and the heirs of his body, and there was no custom in the manor to entail copyholds; the son survived his mother, and had issue, and having become bankrupt, he died before admittance, and before any bargain and sale was executed by the commissioners of this estate: Held, that he took a fee-simple, conditional at common law, and that the commissioners might execute a valid conveyance of the estate after his death, pursuant to 1 *Jas.* c. 15. s. 17. *Doe dem. Spencer v. Clark*, H. 2 and 3 G. 4. 458
9. Where an attorney, in order to get possession of papers belonging to A. B., in the hands of A. B.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that A. B. should enter into an unqualified reference, not revocable, &c.: Held, that A. B. having become subsequently bankrupt for the second time, and without paying 15s. in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 G. 3. c. 121. s. 14. so as to dispense with the reference, and that the attorney was liable, pursuant to his undertaking, to procure A. B.'s signature to an agreement of reference, and to find security for the performance of the award to the satisfaction of the Master. *Ex parte Hughes*, H. 2 and 3 G. 4. Page 482
10. A smuggler may be a trader within 1 *Jac.* 1. c. 15. s. 2. as being a person who seeks his trade of living by buying and selling, although such buying and selling be illegal. A penalty due to the crown is a debt within 21 *Jac.* 1. c. 19. s. 2.; and, therefore, where a trader lay in prison above two months, being unable to pay exchequer penalties for smuggling: Held, that it was an act of bankruptcy. *Cobb, Assignee of Monsey, v. Symonds*, H. 2 and 3 G. 4. 516
11. The commissioners of bankrupt are authorised by the 49 G. 3. c. 121. s. 13. to bring up a bankrupt, charged in execution, for the purpose of a full disclosure of his estate and effects, at any of the three meetings under the commission, or any adjournment thereof. *Spence and Another v. Jones*, E. 3 G. 4. 705
12. A bankrupt in the interval between the second and third meetings under his commission, gave a promissory note as a security for a pre-existing debt to a creditor, who was acting as one of the commissioners at the time, and afterwards signed the bankrupt's certificate. The debt for which the security was given was not proved under the commission: Held, that such security was invalid, and that no action could be maintained upon it. *Haywood Gent. one, &c. v. Chambers*, E. 3 G. 4. 758
13. Where a surety in a warrant of attorney, in order to discharge himself from his personal liability, paid part of the debt due to the creditor of a bankrupt, who had proved under the commission, and thereupon satisfaction was entered on

on the record: Held; that this did not fall within the 49 G. 3. c. 121. s. 8.; as being a payment of part of a debt in discharge of the whole, and that consequently the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him. *Soutten v. Soutten*, T. 3 G. 4. Page 852

14. Where J. S., being desirous of making a shipment for his own risk and advantage, but not in his own name, represented to the merchants through whom the shipment was to be made, that the goods were the property of A., and shipped on his account; and A. accordingly, by the desire of J. S., wrote to those merchants, stating the party to be so, and directing them to insure, and to advance money to J. S. on the goods, which was done: Held, that this was a credit given to A. by J. S., by the delivery of goods, in its nature likely to terminate in a debt; and that, therefore, J. S. having subsequently become bankrupt, A. was entitled to recover the proceeds of the shipment from the merchants, and to set off against them a debt due from the bankrupt to him, it being a case of mutual credit within 5 G. 2. c. 30. s. 28. *Earum and Others, Assignees of Dowsland, a Bankrupt, v. Cato*, T. 3 G. 4. 861

BASTARD.

See SETTLEMENT, 4.

BATHING, RIGHT OF.

The public have no common-law right of bathing in the sea; and, as incident thereto, of crossing the sea shore on foot, or with bathing machines, for that purpose. *Blundell v. Catterall*, M. 2 G. 4. 268

BILLS OF EXCHANGE.

See SET-OFF.

1. A., a foreign merchant, purchased, in his own name, but on account and with the money of B., a British merchant, certain bank shares in the French funds. The latter drew bills upon A., which he accepted, on the security of those shares standing in his name, and these bills were assigned by B. for a valuable consideration to C., a British subject. Before they became due, B. authorised A. by letter to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived, A. had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; B. also afterwards became bankrupt. C., by process in the foreign country, attached the bank shares still standing in the name of A., for the debts due to him upon the bills; and the court there decreed that the bank shares should be sold, and that the proceeds should be applied, first, to pay a debt due from B. to A., and afterwards to retire the bills. Under this decree C. received a certain sum of money on account of the bills: Held, that the assignees of A. could not recover back this money as money belonging to B. *Cozenove and Another, Assignees of Power v. Prevost and Others*, M. 2 G. 4. Page 70
2. The condition of a bond, after reciting that defendant and J. S. had delivered and indorsed to the plaintiff a bill of exchange drawn by J. S., and accepted by A. B., was, that defendant and J. S., or either of them, their heirs, &c. should pay or cause to be paid to the plaintiff, his executors, &c. the sum secured by the bill, within one month after it should become due and payable, in case it should not be

be then paid by the acceptor to the plaintiff, his executors, &c., according to the tenor of the said bill, together with interest from the time the bill became due: Held, that, to an action on this bond, it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and *J. S.*, or either of them. *Murray v. King, M. 2 G. 4.*

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3. Assumpsit will lie upon a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognised by statute. *Murray, Administrator, v. The East India Company, M. 2 G. 4.*

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4. A bill of exchange was accepted, payable at Messrs. *P. and H.*, bankers, *London*, but was not presented there for payment when due, nor until some days after: the acceptor is still liable, no inconvenience having resulted to him from the delay to present the bill. *Rhodes v. Gent, M. 2 G. 4.*

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5. When a defendant, having once written his acceptance with the intention of accepting a bill, afterwards changes his mind, and before it is communicated to the holder, or the bill delivered back to him, obliterates his acceptance: Held, that he is not bound as acceptor. *Cox and Others v. Troy, H. 2 and 3 G. 4.*

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6. Three persons joined as drawer, acceptor, and first indorser, in making an accommodation bill; and it was afterwards issued for value to *J. S.* Previously to its being so issued, its date had been altered: Held, that the acceptor having assented to the alteration when he was informed of it, it was no answer to an action on the bill against him, that the bill had been so altered

without the consent of the drawer and first indorser, and that a fresh stamp was not necessary in consequence of such alteration, the bill having been altered before it was issued in point of law. An accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law. *Downes v. Richardson and Others, Assignees of Thomson, a Bankrupt, E. 3 G. 4.*

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BILL OF SALE.

See VENDOR AND VENDEE, 3.

BOND.

1. *A., B., and C.*, entered into a bond to the king, the condition of which was, that *A.*, as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage-coaches. *A.*, as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. *A. sci. fa.* having afterwards issued upon the bond, *B.*, one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt, that *A.* was a person "surety for, or liable for, a debt" of the bankrupt, within the meaning of the 49 G. 3. c. 121. s. 8.; and, consequently, that the latter was protected by his certificate: Held, also, that the general plea of bankruptcy was well pleaded.

pleaded. *Westcott v. Hodges, M.*
2 G. 4. Page 12

2. The condition of a bond, after reciting that defendant and *I. S.* had delivered and indorsed to the plaintiff a bill of exchange, drawn by *I. S.* and accepted by *A. B.*, was, that defendant and *I. S.*, or either of them, their heirs, &c. should pay or cause to be paid to the plaintiff, his executors, &c. the sum secured by the bill, within one month after it should become due and payable, in case it should not be then paid by the acceptor to the plaintiff, his executors, &c. according to the tenor of the said bill, together with interest from the time the bill became due: Held, that to an action on this bond, it was not a good plea, that the bill when due had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and *I. S.*, or either of them. *Murray v. King, M.*
2 G. 4. 165

3. It is not any defence at law, to an action on a bond against a surety, that by a parol agreement time has been given to the principal. *Davey and Others v. Prendergrass, M.*
2 G. 4. 187

4. Where a bond was given under 4 G. 3. c. 33. s. 1., by a member of parliament, being a trader, and after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given: Held, that the bankruptcy and certificate were no discharge to the bond. *Jameson and Another, v. Campbell, M.*
2 G. 4. 250

5. The condition of a bond, after reciting that *A., B.,* and *C.*, had filed a bill in equity against *D.* and *E.*, was, that the obligee would pay all such costs as the Court of Chancery should award to the defendants on the hearing of the cause: Held,

...by three justices (*Abbott C. J.* dubitante), that the death of *E.* before any costs awarded could not be pleaded in discharge of the bond. *Kipling v. Turner, M.*
2 G. 4. Page 261

5. Debt on a bond given to plaintiff, as treasurer of a friendly society: Plea, that the rules of the society had not been confirmed at the quarter sessions, pursuant to 33 G. 3. c. 54.: Held, *non demurrer*, that the plea was bad, the bond being a good bond at common law. *Jones v. Woollam, E.*
3 G. 4. 769

BROKER.

See PRINCIPAL AND AGENT, 3.

A pawnbroker is a broker within the 5 G. 2. c. 30. s. 39., and therefore subject to the bankrupt laws. *Rawlinson v. Pearson, M.*
2 G. 4. 124

CARRIER.

1. A parcel which, with its contents, exceeded 5*l.* in value, having been delivered to *A.* and *B.*, common carriers, to be carried by their mail-coach, was accepted by them to be so carried, and was actually put into the mail, and carried by that conveyance a short distance; it was then taken out of the mail-coach by a servant of the carriers, and left to be forwarded by another coach, of which *A.* was one of the proprietors, but in which *B.* had no concern; and the parcel was lost. The carriers had previously given notice that they would not be responsible for any package containing specified articles, for which, with its contents, should exceed 5*l.* in value, if lost or damaged, unless an insurance were paid: Held, that, notwithstanding this notice, the carriers were responsible for the parcel in question.

tion, in consequence of their having delivered it to be carried by another coach, of which one of the carriers only was proprietor. *Garnett and Another v. Willan and Jones*, M. 2 G. 4. Page 53

2. A parcel containing country banker's notes, of the value of 1300*l.*, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail-coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was lost. The carriers had previously given notice that they would not be answerable for any parcel above 5*l.* in value, if lost or damaged, unless an insurance were paid. No insurance having been paid in this case, Held, notwithstanding that the carrier was responsible for the loss. *Sleat and Others v. Fagg*, H. 2 and 3 G. 4. 342

3. A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners. Goods having been sent by the carrier, addressed to the order of J. S., a mere factor: Held, that the carrier had not, as against the real owner, any lien for the balance due from J. S. Query, whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from J. S. *Wright v. Snell and Others*, H. 2 and 3 G. 4. 350

CERTIORARI.

The 17 G. 3. c. 56. s. 22. takes away Vol. V.

the writ of certiorari only from offences for the first time, created by 22 G. 2. c. 27., and does not apply to those created by 12 G. 1. c. 34., and extended to the silk and cotton trades, by 23 G. 2. c. 27. *Rex v. Rogers*, E. 3 G. 4. Page 779

COMMISSIONERS.

See SEWERS.

An inclosure act empowered the commissioners to make a rate to defray the expenses of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners. Expenses were incurred in the execution of the act before any rate was made. To defray these expenses the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned, on account of the public drainage, and to place the same to their account, as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts: Held, that the commissioners were personally responsible to the bankers for the drafts so made.

The latter having from time to time made half-yearly rests in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging interest half-yearly was not unlawful on the ground of usury. *Eaton and Others v. Bell*, M. 2 G. 4. Page 34

COMMITMENT.

A commitment for a contempt, being a commitment for punishment, must be for a time certain, and consequently a commitment for a contempt till the defendant is discharged by due course of law, is bad. *Rex v. James*, T. 3 G. 4. Page 894

COMMON.

See TITHE, 1. INCLOSURE ACT, 1.

COMPOUND INTEREST.

See USURY, 1.

CONSTABLE.

A constable apprehended an offender for a misdemeanor committed in his presence in a place of religious worship, and carried him before a magistrate, and was bound over by recognizance to prosecute him for the offence: Held, that the expenses of such a prosecution were not monies expended by him in doing the business of his township, and that he could not charge them in his accounts, under 18 G. 3. c. 49. s. 4. *Rex v. Sevilla and Others*, M. 2 G. 4. 180

Where, in an application for a quod warrant against a constable, the affidavits in support of the rule stated, that for 50 years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial: Held, that it was not sufficient. *Rex v. Lane*, H. 2 and 3 G. 4. 488

CONTINUANCE

See PRACTICE, 1.

CONTUMACE CAPiendo.

WRIT OF.

See WARRANT.

CONVICTION.

Where the sessions, without hearing the merits, quashed a conviction under 39 and 40 G. 3. c. 106. s. 4., for a defect in form, the Court of King's Bench will, upon a removal of the order by certiorari, quash the order of sessions, if they are of opinion that there is no defect in form, and send the case back to be heard upon the merits: It was stated in such conviction that defendants had attended a meeting for carrying on a combination of journeymen, for the purpose of obtaining an advance of wages: Held, that this expression was synonymous with the words of the act, which prohibits combinations to obtain an advance of wages, and that the conviction was sufficient. *Rex v. Ridgway*, H. 2 and 3 G. 4. Page 527

COPYHOLD.

See BANKRUPT, 8.

- Where, by the custom of a manor, a feme covert was allowed by will to pass her copyhold lands, the same having been previously surrendered by husband and wife, (the wife having been examined separate and apart from her husband, and consenting thereto,) to the use of her will, and a feme covert being seised of copyhold lands in the manor, made her will subsequently to the 55 G. 3. c. 192., and there was no surrender to the use of her will: Held, that the copyholds did not pass by the will, the 55 G. 3. c. 192. having only supplied the want of a formal surrender, and the surrender in this case being matter of substance, and requiring to be accompanied by the separate examination of the wife. *Doe dem. Nathaniel v. Barthe*, H. 2 and 3 G. 4. 492

2. Where

2. Where a copyholder has been admitted to a manor and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture from shewing that the legal estate was not in the lord at the time of admittance. *Doe dem. Nepean, Bart. v. Budden, E. 3 G. 4.* Page 626

COPYRIGHT.

1. The manager of a theatre having publicly represented for profit a tragedy, altered and abridged for the stage, without the consent of the owner of the copyright, is not liable to an action, although the tragedy had been previously printed and published for sale. *Murray v. Elliston, E. 3 G. 4.* 657
2. The vendor of a print, being a copy in part of another, by varying in some trifling respects from the main design, is liable to an action by the proprietor of the original; and that although the vendor did not know it to be a copy. *West v. Francis, E. 3 G. 4.* 737

CORPORATION.

See *ADMINISTR.* 2.

COSTS.

See *PRACTICE*, 2. 7. 8. 9. 10. 15. 16. 28. 32. 49.

COUNTY RATE.

See *JUSTICES*, 2.

COURT.

By charter the king granted, that the steward and suitors of a manor should have power to hold a court for the determination of civil suits, and there had been a non-user of the court for 50 years (except for the purpose of levying fines and suffering recoveries): Held, that this court being for the public be-

nefit, the words of permission in the charter were obligatory, and that the right of determining suits was not lost by the non-user. *Ret v. The Steward and Suitors of Havering Atte Bower, E. 3 G. 4.* Page 691
Ret v. The Mayor and Jurats of Hastings, &c. S. P. 692

COURT LEET, STEWARD OF.

See *PRACTICE*, 42.

COURT OF REQUESTS.

An infant cannot be appointed to the office of clerk of a court of requests, where it is part of the duty of that officer to receive the money of the suitors. *Claridge v. Evelyn and Others, M. 2 G. 4.* 81

COVENANT.

1. A covenant to repair against fire premises situated within the weekly bills of mortality mentioned in 14 G. 3. c. 78, is a covenant that runs with the land. *Farrow v. Smith, M. 2 G. 4.* 1
2. A covenant by a lessee that he will sufficiently muck and manure the land with two sufficient sets of muck, within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenant's laying on two sets of muck within the three last years of the term. *Pointall v. Moores, H. 2 and 3 G. 4.* 416

CRIMINAL INFORMATION.

1. The Court will grant a criminal information for a libel upon a public body of men upon an affidavit, stating the publication of the libel by the defendant. *Rees v. Williams, E. 3 G. 4.* 595
2. Where the fact of a criminal

minate a magistrate took place twelve months before the application to the Court, they refused to grant a criminal information, although the prosecutor, in order to excuse the delay, stated that the facts had not come to his knowledge till very shortly previous to the application. *Rex v. Bishop*, E. 3 G. 4. Page 612

3. An information for perjury stated, that defendant, before a committee of the House of Commons, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c. It then set out the evidence so given. The count then averred, that the defendant, at the bar of the House of Lords, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c. It then set out the evidence, which was directly contrary to that given before the House of Commons; and concluded (after averments as to the identity of the persons and places referred to in the evidence on both occasions), and so the jurors aforesaid do say, that the said E. H. did commit wilful and corrupt perjury: Held, on motion in arrest of judgment, that this count was bad. *Rex v. Harris*, T. 3 G. 4. 926

CUSTOM.

Where in an application for a qu warranto against a constable, the affidavits in support of the rule stated that for 50 years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial: Held, that it was not sufficient. *Rex v. Lane*, H. 2 and 3 G. 4. 488

CUSTOM HOUSE OFFICERS.

See VENDOR AND VENDEE, 3.
PRACTICE, 27.

DAMAGRS.

See PRACTICE, 27. 35.

DEBT.

See PRACTICE, 89.

DEED.

1. Where there were two assignments of the same lease of premises within the county of *Midlesex*, and that executed last was registered first: Held, that the deed last registered must, in a court of law, be considered as fraudulent and void in consequence of 7 Ann. c. 20. s. 1, although the party claiming under the second assignment had full knowledge when it was executed of the prior execution of the first assignment. *Doc dem. Robinson v. Allsop*, M. 2 G. 4. Page 142
2. Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor under a judgment, obtained against the then owner of the land, and defendant's family had continued in possession ever since: Held, that the original possession having been taken, not under any conveyance, the length of possession was only *prima facie* evidence from which a jury might infer a subsequent conveyance by the original owner or some of his descendants; but that it might be rebutted, and that the jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed. *Doc dem. Fenwick and Others v. Reed*, M. 2 G. 4. 232
3. By a composition-deed, reciting that

that the insolvent was indebted in certain sums to J. P. for rent, to the crown for duties, to A. and B. upon judgment, and to the other creditors in the sums of money set opposite their names in the schedule, the insolvent bargained and sold to trustees all his leasehold messuages, subject to certain mortgages, and all his personal estate whatsoever, upon trust to carry on the brewing and malting business for the benefit of the creditors, and to collect outstanding debts, and to sell the farming stock, and out of the monies arising from the sale of any part of the estate that should be mortgaged, to satisfy the mortgage, and to stand possessed of the residue upon trust to pay J. P. the rent due to him, the duties due to the crown, the rent which was, or hereafter should become due for any of the premises assigned, the interest upon the mortgages, then the judgment debt due to A. and B., then to pay all the creditors whose debts did not amount to 10*l.* in full, and at the expiration of nine months, to pay all the other creditors the amount of 5*s.* in the pound. There was a covenant by the creditors that they would release their respective claims to the insolvent. The indenture contained a proviso, that in case any creditor whose debt should amount to 100*l.*, or any two creditors whose debts should amount to 150*l.* should not execute within three calendar months, the deed should be void. A. and B., the judgment creditors, whose debt exceeded 150*l.*, did not execute the deed within the time required: Held, that the deed was not thereby rendered void, the intention manifestly being, that those creditors only who were to receive a composition under the deed, were

to execute it. *Wells v. Greenhill*, T. 3 G. 4. Page 869

DEVIATION.

See INSURANCE.

DEVISE.

See WILL, 1, 2.

1. A testator by his will bequeathed the rents of one dwelling house situate in A., to C. B. for his life; and from and after the decease of the said C. B., he bequeathed the same rents, together with the rents of all his other houses and lands unto his nephews and niece therein mentioned, for their lives and the life of the survivor; and after the decease of the survivor of them, he gave and devised all his houses and lands to trustees in trust to sell the same, and to pay the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor; and then devised all the residue of his estate to C. B.: Held, that upon the death of the testator, the nephews and niece took an immediate estate for their lives and the life of the survivor, in the rents of all the houses and lands, except the house specifically bequeathed to C. B. for his life. *Doe dem. Annandale and Others v. Brazier*, M. 2 G. 4. 64
2. A. by his will, devised all his messuage or dwelling house, with the appurtenances, in High-street, in the town of H., and all and every his buildings and hereditaments in the same street to his mother for life, and after her death to C. D. A. had only one house in the High-street, but behind that house he had two cottages, fronting a lane, called Bake-house-lane. There was no thoroughfare through that

of the estates should be sold and equally divided, share and share alike amongst his (the testator's) brothers and sister: Held, that this latter devise extended both to the real and personal estate, and that the husbands of each of the daughters by necessary implication took an estate for life in the real property bequeathed to their respective wives. *Doe dem. Driver and Others v. Bowling, E. 3 G. 4.* Page 722

8. Devise to A. for 99 years, if he should so long live; remainder to his first son, then unborn, for 99 years, if he should so long live, and so on in tail male to such first son lawfully issuing for ever, and for want and in default of such issue of such first son, to the second and other sons successively for 99 years only, in case he should so long live; and that such elder son, or the issue of such elder son, should have no greater estate than for 99 years, determinable at his decease; and if there should be no issue male of A. at the time of his (A's) death, or in case there should be such issue male at that time, and they should all die before A. without issue male, then to B. for 99 years, if he should so long live; remainder to the first son of B. for 99 years, if he should so long live, &c.: Held, that A. took under the will an estate for 99 years in the freehold, estates determinable with his life, and the same estate in the leasehold, if they should so long continue, and that upon his death, his first son should take an estate for 99 years in the freehold, determinable with his life, and the remainder of the term in the leasehold; but, that the limitations to the second and other unborn sons of A. were void as tending to perpetuity; and the

limitations over to B. &c. after these void limitations, were not accelerated, but were void also. *Regrd. v. Watcott and Others, T. 3 G. 4.* Page 801

9. A testator devised certain estates to his daughter for life, and after her decease, to her son A. B. an infant, for life; and after the determination of that estate by forfeiture, or otherwise to trustees to preserve, contingent remainder, but to permit A. B. to receive the profits during his life, and after the decease of A. B., then to the heirs of his body for ever with a devise over in case of the failure of his issue: Held, that A. B. took an estate tail in remainder. *Measure v. Gee, T. 3 G. 4.* Page 800
10. R. Lowe by will devised all his landed estates to trustees, and bequeathed 10,000*l.* as a portion to his daughter C. L., but in case she should marry any one of his three kinsmen named in the will, he gave to which even of them she married, certain estates therein specified, he taking the name of Lowe and settling upon her an annuity of 1000*l.* a year during her life, and in case that circumstance did not take place with his daughter C. L., he then directed that it might be offered to his other daughter D. L. in every particular; and in case neither daughter should marry in the manner above mentioned, then he directed that his daughters should have 10,000*l.* each, and in that case he gave all his estates to W. L. his kinsman, for ever, and to his heirs, taking the name of Lowe irrevocably. After the date of this will, C. L. married one H. J. who was not one of the persons named in the will, who would have become entitled to the estate after she married him, and the testator

testator paid her a married portion; and afterwards by a codicil to his will revoking her marriage, and that he had given her a fortune, he revoked all devises and bequests in her favour contained in his original will, and also all claim which her husband *W. H.* might have to any of his real and personal estates by virtue of his marriage with his daughter *C. L.*, and by virtue of his said will, and in lieu thereof, he bequeathed unto each of their children a pecuniary legacy; and he then directed, that in case his other daughter should marry either of the persons mentioned in his will, then upon condition, that either of those persons (whom she married and his heirs should accept, take and use the name of *Lowe* only, he gave all his real and personal estate unto such of those persons whom she married, and his heirs; and in case his daughter *A. L.* should not marry either of the persons mentioned in his will, or if she married one of them, and he refused to accept, take, and use the name of *Lowe*, in that case he revoked all his devises and bequests contained in his will and codicil in her favour, and in lieu thereof bequeathed her £10,000. The testator died soon after the date of his codicil, and his daughter *A. L.* afterwards married *B. F.* who was not one of the persons named in the will, who would have been entitled to the estate in the event of her having married him, and upon that occasion, the £10,000. was paid to her, and *W. D.* then entered upon the testator's estates, and took upon himself the name of *Lowe*, and suffered a recovery; Held, that *W. D.* was seized of an indefeasible estate in fee simple in the estate in question. *Lowe v.*

See William Manners, Baron, 7. 8 G. 4. Page 937

DISTRESS.

See LANDLORD AND TENANT, 2.

LEASE, 2.

DOWER.

Certain lands were conveyed to *A. B.*, his heirs and assigns, to such uses as *C. D.* should by deed appoint; and in default of, and until appointment, to the use of *C. D.* in fee. *C. D.* afterwards, in execution of the power by deed duly made an appointment of the said estates in favour of *E. F.* in fee. *C. D.*, at the time of making the appointment, was married. His wife was held not to be dowerable out of these lands. *Ray v. Pung, E. 3 G. 4. Page 561*

ECCLESIASTICAL COURT JURISDICTION OF.

See WARRANT, 1.

EJECTMENT.

1. The growing crops of a tenant having been seized under a *fi. fa.* a writ of *hab. fac. poss.* was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord founded on a demise made long before the issuing of the *fi. fa.* Held, that the sheriff was not bound to sell the growing crops under the *fi. fa.* inasmuch as they could not in point of law be considered as belonging to the tenant, the latter being a trespasser from the day of the demise and in the declaration. Held, also, that the sheriff had no right to allow to the landlord a year's rent, under the statute of 8 Ann. c. 14, that statute contemplating an existing tenancy, which in this case, must be taken to have ceased on the day of the demise.

by descent in the ejectment. *Hodgeson v. Smith & Others, Assignees of Beaton v. V. Gossignet, M. 2 G. 4. Page 88*

2. The declarations of a widow in possession of premises, that she held them for her life, and that after her death they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years' adverse possession. *Doe dem. Haman v. Pettitt, M. 2 G. 4. 223*

223
3. Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor, under a judgment obtained against the then owner of the land, and defendant's family had continued in possession ever since: Held, that the original possession having been taken not under any conveyance, the length of possession was only prima facie evidence from which a jury might infer a subsequent conveyance by the original owner, or some of his descendants, but that it might be rebutted, and that the jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed. *Doe dem. Fenwick v. Read, M. 2 G. 4. 232*

232
4. Where a rule has been obtained for staying the proceedings in ejectment, till the costs of a former ejectment have been paid, the Court will not interfere, and permit the defendant, in case those costs are not paid before a certain day, to be named by the Court to non-repore the ejectment pending. *Doe dem. Sutton v. Ridgway, H. 2 and 3 G. 4. 523*

523
5. Where a copyholder has been admitted to a tenement, and done perfectly to the lord of a manor, he is estopped in an action by the lord for a forfeiture, from shewing that the legal estate was not in the

lord at the time of admittance. *Doe dem. Napton v. Budden, E. 3 G. 4. Page 626*

6. The notice to the tenant in possession at the foot of the declaration in ejectment, need not be in the name of the plaintiff, but, if in the name of the lessor of the plaintiff, or even any other person, the Court will permit the rule for judgment against the casual ejector to be drawn up. *Goodtitle dem. Duke of Norfolk v. North, T. 3 G. 4. 849*

EMANCIPATION.

1. A pauper being eighteen years of age, and residing with his father, was drawn as a militiaman, and served for five years as a halibuted man. During his service he, several times when on furlough, and finally after his discharge from the militia, returned to his father's house: Held, that by his so remaining separated from his father's family after twenty-one, he was emancipated, although the original separation was not voluntary on his part. *Rex v. The Inhabitants of Hardwick, M. 2 G. 4. 176*
2. During the minority of a child there can be no emancipation, unless he marries, and so becomes himself the head of a family, or contract some other relation, as wholly and permanently to exclude the parental control. *Samble*, that the acquiring a settlement of his own does not properly constitute an emancipation. *Rex v. The Inhabitants of Wilmington, H. 2, and 3 G. 4. 525*

ESTOPPEL.

See RELEASE, I. PLEADING, 25.

ESTREAT.

See PRACTICE, 19.

EVIDENCE.

EVIDENCE.

1. Declaration stated, that, in consideration that plaintiff would assign to the defendant a bill of exchange, defendant undertook, &c., and then averred that plaintiff did assign the bill. It appeared that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter however paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement the plaintiff, by deed, assigned to the defendant the bill, and all sums of money due thereon, to and for the defendant's own use; and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill: Held, that the declaration imported that the plaintiff had made an absolute assignment of the bill, and, consequently, that the assignment in evidence being only conditional, this was a fatal variance. *Vassandau v. Burt*, M. 2 G. 4. Page 42

2. In trespass, the first count of the declaration stated, that defendant assaulted and imprisoned plaintiff; and, during such imprisonment, struck, pulled, and pushed him about; justification, that defendant arrested plaintiff under process of court, and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c.: Held, that this latter part of the justification not being proved, the plaintiff was entitled to judgment, and that it was not necessary to new assign the battery by the defendant. Held, also, the second count of the declaration (which omitted the battery) having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still

entitled to judgment, having proved the trespasses as laid in the first count. *Phillips v. Houghton*, M. 2 G. 4. Page 220

3. The declarations of a widow in possession of premises, that she held them for her life, and that after her death, they would go to the heirs of her husband, were admissible evidence to negative the fact of her having had 20 years adverse possession. *Dordev. Human v. Pettett*, M. 2 G. 4. 223

4. Where a defendant's ancestor came into possession of certain lands in 1762, as a creditor under a judgment obtained against the then owner of the land, and defendant's family had continued in possession ever since: Held, that the original possession having been taken not under any conveyance, the length of possession was only prima facie evidence, from which a jury might infer a subsequent conveyance by the original owner, or some of his descendants; but that it might be rebutted; and that the jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed. *Dordev. Farwick v. Reed*, M. 2 G. 4. 232

5. Where an assignment of a lease by deed, taken in execution was made in the name and under the seal of office of the sheriff, by A.B. acting as under-sheriff: Held, that such assignment was sufficiently proved, without proving further the appointment of A.B. as under-sheriff; and that he had power by deed to execute deeds in the name of the sheriff. *Dordev. James v. Brown*, M. 2 G. 4. 243

6. An issue having been directed to satisfy the Court as to the forgery of a signature to a warrant of attorney, a verdict was found, establishing the genuineness of it, upon evidence

...evidence satisfactory to the Judge who tried the cause, and to the Court upon his report of it. In the course of the trial, an inspector of franking, who had never seen the party write, was called to prove, from his knowledge of hand-writing in general, that the signature on a document was not genuine, but an imitation; this evidence having been rejected, the Court refused to disturb the verdict, on the ground that such evidence, even if admissible, was entitled to very little weight, and that the issue being to satisfy the Court, a new trial ought not to be granted, unless for the rejection of evidence which might reasonably have altered the verdict. *Quare*, if such evidence be admissible at all. *Gurney v. Longland*, H. 2 and 3 G. 4. Page 330

7. An estate in fee, upon the determination of a life estate, was devised to the wife of A. B. A. B. was one of the attesting witnesses to the will. The testator died in 1870, and the wife of A. B. died in 1882, before the previous life estate was determined. Held, that A. B. was not a good attesting witness to this will. *Hutfield v. Tharp*, E. 3 G. 4. 589

8. Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of a third person, speaking of the plaintiff's conduct, and the declaration, in setting it out, had omitted those references: Held, that these omissions altered the sense of the remainder, and that the variance was fatal. *Cartwright v. Wright*, E. 3 G. 4. 615

9. Where a copyholder has been admitted to a tenement, and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture, from shewing that the legal estate was not in the lord

at the time of admission. *Doc den. Nepean v. Biddle*, E. 3 G. 4. Page 526

10. To an action on bill of exchange the defendant pleaded non assumpsit to all but a part, and as to that part a tender. Replication, that after the cause of action accrued, and before the tender, the plaintiff demanded the smaller sum. Held, that this issue would only be supported by proof of the demand of the precise sum tendered. *Rivers v. Griffiths*, E. 3 G. 4. 630

11. A petition, addressed by a creditor of an officer in the army to the secretary at war, bona fide and with a view of obtaining, through his interference, the payment of a debt due, and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable. In such an action, even upon the general issue, evidence may be received to shew that the writer bona fide believed the facts stated in the petition to be true. *Fairman v. Ives*, E. 3 G. 4. 642

12. A bill against an attorney was filed of *Michaelmas* term, and appeared by the memorandum to have been filed on the 28th November. Held, that evidence was admissible to shew that it was actually filed on the 24th December. Held, also, that a demand and refusal is evidence of a prior conversion; and, therefore, where deeds were in defendant's possession prior to *Michaelmas* term, and the demand and refusal proved were on the day after that term, it was held, that this was evidence of a conversion before the term. *Wilton v. Girdlestone*, T. 3 G. 4. 844

13. Where premises had been demised by two tenants in common, and

and the rent for a time paid to the agent of both, but afterwards the tenants had notice to pay a moiety of the rent to each of the two; and the rent was so paid accordingly, and separate receipts given: Held, that it then became a question of fact for a jury to say, whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of rent to each. *Powis v. Smith*, 13 B. & G. 414. Page 850

EXECUTION.

See FIERI FACIAS.

EXECUTOR.

The property of a deceased person vests in his executor from the time of his death, in an administrator, from the time of the grant of the letters of administration; and, therefore, where A. took out letters of administration under a will, by which he was appointed executor, and after notice of a subsequent will, sold the goods of the testator: Held, that the rightful executor in an action of trover was entitled to recover the full value of the goods sold, and A. was not entitled, in mitigation of damages, to shew that he had administered the assets to that amount. *Woolley, Executrix, v. Clark, E. 1783*. Page 744

EXECUTORY DEVISE.

See DEVISE, 8.

EXTRA-PAROCIAL DISTRICT.

See SETTLEMENT, 4.

FACTOR.

The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him

for sale; the factor being similarly indebted to A. He sold the goods to him. The factor afterwards became bankrupt, and on a settlement of accounts between A. & the assignees, A. disallowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees, afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.

By 47 G. 3. sess. 2. c. 28. s. 69.

"All contracts for sales are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market." A factor having coals consigned to him for sale by A., sold the same, and entered the contract in his book, as having been made for A., the master of the ship. It was not signed by the purchaser, but in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted; the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. *Quinn, v. Whitham*, under the circumstances, an action might be brought in the name of A. for the price of the coals. *Madon v. Grange, 11 B. & G. 414*. Page 87

FIERI FACIAS.

See COPYHOLD, 1. PRACTICE, 23.

1. The growing crops of a tenant having

Having been seized under a fi. fa.,
the writ of hab. fac. pasc. was sub-
sequently delivered to the sher-
iff, in an ejectment, at the suit of
the landlord, founded on a demise
made long before the issuing of
the fi. fa.: Held, that the sheriff
was not bound to sell the growing
crops under the fi. fa., inasmuch as
they could not in point of law be
considered as belonging to the ten-
ant; the latter being a trespasser
from the day of the demise laid in
the declaration. *Hodgson v. Gar-
rington*, 11. 2 G. 4. Page 68

A sheriff has no right, under a fi.
fa., to seize fixtures, where the
house in which they are situated is
the freehold of the person against
whom the execution issues. *Winn
v. Ingilly, Burt and Another*, E.
6 Q. 4. 625

FINE.

See MORTGAGE AND MORT-
GAGE, 2.

By marriage settlement, dated De-
cember, 1806, certain manors and
lands were limited to the husband
for life; remainder to the wife for
life; remainder to the use of the
first and other sons of the marriage
successively in tail male; remain-
der in case the wife should survive
the husband, to her in fee; but if
she should die in the lifetime of her
husband, remainder to the daugh-
ters successively in tail male; re-
mainder to the use of such persons
related by blood or consanguinity,
and in such cases for interests,
and in such manner and charged
with such sums of money in favour
of such persons so related, as the
test will ought appoint; and in
case of no such appointment, to
her in fee. The settlement also
contained a power for the trustees
there named, at the request, and
by the direction of the husband

and wife, or the survivor, to sell
or exchange the settled manors,
and for that purpose, to make
all and any of the uses contained
in the settlement; and also a cove-
nant by the husband for further
assurance on his part, and that of
his wife, and all persons claiming
under him. In pursuance of this
settlement, certain fines were le-
vied. By deed, dated March,
1807, reciting the settlement, and
the fines levied in pursuance there-
of, and the limitations therein con-
tained, and further, that the wife
was desirous of acquiring an abso-
lute power of appointment over
the manors, &c. comprised in the
settlement, in the event of her
surviving, or dying in the lifetime
of her husband, and these being
a general failure of issue of her
body, inheritable to the manors,
&c. under the settlement, the hus-
band and wife covenanted to levy
certain fines, sur cohabence, de
droit come ceo, with proclama-
tions, to J. G. and his heirs, of all
the manors, &c. comprised in the
settlement; which fines were to
operate, and to be taken, to oper-
ate, first, for corroborating the
uses contained in the settlement
antecedently to the limitations to
the use of the wife in fee simple,
and subject thereto to the uses of
such persons, &c. as the wife by
will or deed might appoint in
pursuance of this latter deed; se-
veral fines were also levied
by the husband and wife, to wit,
that, under these circumstances,
these latter fines did not operate
to extinguish, destroy, or suspend
the right or power of the husband
and wife, and the survivor of them,
to request and direct a sale or ex-
change of the settled manors under
the powers for that purpose con-
tained in the settlement, or to
prevent an exercise of those powers

FORFEITURE.

by the trustees. *The Earl and Countess of Jersey and Others v. Denny*, E. 3 G. 4. Page 369

FIXTURES.

A sheriff has no right under a fi. fa. to seize fixtures, where the house in which they are situated is the freehold of the person against whom the execution issues. *Winn v. Ingilby*, E. 3 G. 4. 625

FORFEITURE.

See COPYHOLD, 2.

Devise of a mansion-house and lands to trustees, upon trust until John *Luscombe Manning* should attain to the age of 21 years, and then to him for life, he taking and using the testator's surname of *Luscombe* instead of his own surname, with limitations over to his first and other sons in strict settlement, they severally taking and using the testator's surname instead of their own. There were other limitations over to other persons. The will then contained a proviso, that if when any of the premises thereby devised should vest in any person not bearing the surname of *Luscombe*, that person should, as soon as he should be in possession of the estate, take upon himself the name of *Luscombe*, and use the same as for and instead of his own surname, and should, within three years then next after, procure his birth name to be altered to the testator's surname of *Luscombe* by act of parliament, or some other effectual way for that purpose, and bid cause any of the persons to whom the estate was limited, and who should be in possession of the same, should not take and use the testator's surname, but should neglect to get an act of parliament, or some other authority as effectual as for that purpose as aforesaid, for the space of three years next after

FOREIGN ATTACHMENT. 323

he should be in possession, that then the estate devised for the benefit of such persons should neglecting to get such act of parliament, or other authority, should cease, and become void, as if no such use or estate had been thereby devised; and the same should immediately, upon the expiration of the three years, go over to and vest in the person next in remainder or reversion, in the same manner as if such person so neglecting to change his surname was dead without issue, upon this express condition, that such person so to take did and should also take the testator's surname, and get an act of parliament, or some other authority as effectual for that purpose, otherwise the estate was to go over again. *J. L. Manning*, before he came of age, or entered into possession of the premises demised, took upon himself, used, and bore the surname of *Luscombe* and no other. But no act of parliament had ever been obtained authorising him to change his name, nor was the king's license for that purpose obtained within three years after he so entered into possession: Held, that inasmuch as he bore the surname of *Luscombe* at the time when the estate came to him, he had substantially complied with the directions of the testator, and that he did not incur a forfeiture of that estate by not obtaining an act of parliament, or other authority, the prohibition only applying to persons not bearing the surname of *Luscombe* at the time when the estate vested in them. See *Denny v. Luscombe* v. Yates, H. 3 and 4 G. 4. Page 344

FOREIGN ATTACHMENT.

See also in the same work the following cases: *Thames v. G. & Co.* 70. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

where the proceedings are similar to those in the superior courts; and, therefore, does not extend to the case of a foreign attachment.

Bulmer v. Marshall, T. 3 G. 4.

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FRAUDS, STATUTE OF.

1. The agent contemplated by the 17th sect. of the statute of frauds, who is to bind a defendant by his signature, must be a third person, and not the other contracting party; and, therefore, where an auctioneer wrote down the defendant's name by his authority opposite to the lot purchased: Held, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute. *Farebrother v. Simmons*, H. 2 and 3 G. 4. 339

2. A, a merchant in London, had been in the habit of selling goods to B, resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B. by the first ship. In pursuance of a parol order from B., goods were delivered to and accepted by the wharfinger to be forwarded in the usual manner: Held that this, not being an acceptance by the buyer, was not sufficient to take the case out of the 29 Car. 2. c. 3. s. 17. *Hanson and Another v. Armitage*, H. 2 and 3 G. 4. 557

3. An estate in fee upon the determination of a life estate, was devised to the wife of A. B.; A. B. was one of the attesting witnesses to the will. The testator died in 1779, and the wife of A. B. died in 1813, before the previous life estate was determined: Held, that A. B. was not a good attesting witness to this will. *Hatfield v. Thorp*, E. 3 G. 4. 589

4. Where there was a verbal contract

by the plaintiff, who were millers, for the sale of a quantity of flour, which, at the time, was not prepared, and in a state capable of immediate delivery: Held, that this was a contract for the sale of goods within 29 Car. 2. c. 3. s. 17. *Garbutt v. Watson*, H. 3 G. 4. Page 613

5. A horse was sold by verbal contract, but no time was fixed for the payment of the price. The horse was to remain with the vendor for 20 days without any charge to the vendee. At the expiration of that time the horse was sent to grass, by the direction of the buyer, and by his desire entered as the horse of one of the vendors: Held, that there was no acceptance of the horse by the vendee within 29 Car. 2. c. 3. s. 17. *Cartwright v. Toussaint*, T. 3 G. 4. 854

FREEHOLD.

See FIXTURES, 1.

FRIENDLY SOCIETIES.

See PLEADING, 27.

GAME.

In order to constitute the offence of keeping a setting dog, within the 5 and 6 Anne. c. 14. s. 1, the dog must be kept for the purpose of killing and destroying game, and, therefore, where it appeared that, at the time when the alleged offence was charged to have been committed, the dog was tied up, and never went out into the field with its master, this was held not to be an offence within the statute. *Hayward v. Horner*, H. 2 and 3 G. 4. 317

HABEAS CORPUS.

See PRACTICE, 10.

HAR-

HARBOUR DUES.

An act of parliament, imposing a tonnage duty on vessels coming into the harbour of *Dover*, contained an exception of all vessels employed in his majesty's service: Held; that a vessel hired by the postmasters-general to carry the mails and government dispatches to and from *Dover* to *Calais*, &c. the master of which was permitted to carry passengers and their luggage, and bullion, upon freight, is a vessel coming within the exception. *Hamilton v. Stow*, E. 3 G. 4.

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HIGHWAY.

See INCLOSURE ACT, 4.

Two magistrates authorised the surveyor of a turnpike road which ran through twenty-nine townships, to collect for the repair of the road a composition in lieu of the statute duty. The surveyor was not examined upon oath as to the necessity of the composition. He afterwards made an assessment of six-pence in the pound upon the annual value of the lands of a particular township through which the turnpike road passed. The sum to be collected under the assessment was the amount which the surveyor of the turnpike roads could in any case demand from the inhabitants of the township, and much exceeded what was required to put that part of the road lying in the township into complete repair. The turnpike surveyor having returned the assessment to the surveyor of the highways of the township, directed him to collect the sums therein mentioned. Upon a refusal to pay the sum assessed by an inhabitant of the township, two magistrates granted a warrant of

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distress to levy the same: Held, that the warrant was bad, the magistrates having no jurisdiction whatever, upon the ground that, in order to legalise the demand under the assessment, it ought to have been previously ascertained how many days' statute duty would be required to put the road into complete repair, the composition being demandable only in respect of that number of days' statute duty.

Semble, that in order to justify magistrates in granting an authority to collect a composition in lieu of statute duty, it should be made to appear upon oath; to both the magistrates present, that the road can be more effectually repaired by such composition.

Semble, also, that where the composition is to be collected in several townships, it ought to appear on the face of the authority itself, that, in the judgment of the magistrates, a composition, in lieu of statute duty, is advisable in each particular township. *Stanley, Bart. v. Fielden and Others*, H, 2 and 3 G. 4.

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INCLOSURE ACT.

1. *A.*, having purchased an estate free from rectorial tithes, with a right of common thereto annexed; the common was afterwards inclosed under an act of parliament, and certain land was allotted to *A.* in lieu of his said right of common: Held, that no tithe was payable in respect of the allotted land. *Steele v. Manns*, M. 2 G. 4. 25
2. An inclosure act empowered the commissioners to make a rate to defray the expenses of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commission-

3 F

err:

ers. Expenses were incurred in the execution of the act before any rate was made. To defray these expenses the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts: Held, that the commissioners were personally responsible to the bankers for the drafts so made.

The latter having from time to time made half-yearly rests in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging of interest half-yearly was not unlawful on the ground of usury. *Eaton and Others v. Bell*, M. 2 G. 4. Page 34

3. By an inclosure act it was enacted, that the commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed, unto the impropriate rectors and curate, in lieu of all great and vicarial tithes; and the commissioners were required to distinguish by their award the several allotments to the impropriate rectors and curate respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes: Held, under this act, that the tithes were not extinguished until the commissioners made their award. *Ellis v. Arnison*, M. 2 G. 4. 47

4. By a clause in an inclosure act, a commissioner was authorised to stop up any way, provided it be done by the order, and with the concurrence of two justices, and that order was to be subject to an appeal in

like manner, and under such form and restrictions, as if the same had been originally made by such justices. By a subsequent clause, any party aggrieved was to be at liberty to appeal at any time within six months after the cause of complaint. Under this act, the commissioner, with the concurrence and order of two justices, stopped up a road without giving the public notices required by the 55 G. 3. c. 68.: Held, that a party aggrieved might, under these circumstances, appeal at any time within six months. Quære, whether it be necessary to give such notices where roads are stopped up under the provisions of an inclosure act. *Rex v. Townsend*, H. 2 and 3 G. 4. Page 420

INDICTMENT.

See CRIMINAL INFORMATION, 3.

INFANT.

1. An infant cannot be appointed to the office of clerk of a Court of Requests, where it is part of the duty of the officer to receive the money of the suitor. *Claridge v. Evelyn*, M. 2 G. 4. 81
2. Where an infant held himself out as in partnership with I. S., and continued to act as such till within a short period of his coming of age; but there was no proof of his doing any act as a partner after twenty-one: Held, that it was his duty to notify his disavowance of the partnership on arriving at twenty-one; and as he had neglected to do so, that he was responsible to persons who had trusted I. S. with goods, subsequently to the infant's attaining twenty-one, on the credit of the partnership. *Goode and Benjamin v. Harrison* (an error), M. 2 G. 4. 147
3. Where judgment of nonsuit had been given in an action brought against

against an infant, it is no ground of error that the infant had appeared by attorney. *Bird v. Pegg*, H. 2 and 3 G. 4. Page 418

INSOLVENT ACT.

See PRACTICE, 26.

INSURANCE.

See COVENANT, 1.

1. By a policy, a ship was insured at and from *Hull* to her port or ports of loading in the *Baltic Sea* and *Gulf of Finland*, with liberty to proceed to and touch and stay at, any port or ports whatsoever, for any purpose, particularly at *Elsinore*, without being deemed a deviation. The ship touched and stayed at *Elsinore* and *Dantzic*, to deliver goods, *Pillau* being her port of loading: Held, that this was a deviation. *Solly and Another v. Whitmore*, M. 2 G. 4. 45
2. A policy was effected on living animals, warranted free from mortality and jettison. In the course of the voyage, some of the animals, in consequence of the agitation of the ship in a storm, were killed; and others, from the same cause, received such injury that they died before the termination of the voyage insured: Held, that this was a loss by a peril of the sea, for which the underwriters were liable. *Lawrence v. Aberdeen*, M. 2 G. 4. 107
3. Where, in an action on a policy of insurance on ship, in the usual form, for twelve months, at sea and in port, the loss averred was as follows: that the ship having arrived at the harbour of *St. J.*, and discharged her cargo, it became necessary to place her, and she was accordingly placed, in a graving-dock, there to be repaired, and near to a certain wharf in the graving-dock; and that, whilst she

was there, by the violence of the wind and weather, she was thrown over on her side, whereby she struck the ground with great violence, and was bilged, &c.: Held, that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes, &c." for which the underwriters were liable. Held, also, that the above facts, with the additional circumstance of there being two or three feet water in the graving dock when the accident happened, did not amount to a loss by perils of the sea. *Phillips and Another v. Barber*, M. 2 G. 4. Page 161

4. The underwriters on a policy of insurance are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners. *Walker v. Maitland*, M. 2 G. 4. 171
5. Where, during the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water; and the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there: Held, that this was a stranding within the usual memorandum in the policy, the accident having happened not in the ordinary course of such voyage. *Rayner v. Godmond*, M. 2 G. 4. 225
6. Insurance from *London* to *Jamaica* generally. The goods insured were destined to a particular place in the island, and the usual course in such cases was for the ship to proceed to an adjoining port, and there to tranship the cargo into shallops; but no information of this was given to the underwriters: Held, notwithstanding, that they

were liable for a loss occurring after such transshipment on board the ship. *Stewart v. Bell, M. 2 G. 4.* Page 238

Where a ship and cargo was barratrously taken out of her course by the crew, and the ship and part of the cargo sold, and the remainder sent home by another vessel: Held, that this was a total loss of the cargo from the time of the committing of the act of barratry. *Dixon v. Reid, E. 3 G. 4.* 597

INTEREST.

See ADMINISTRATOR, 1.

IRISHMAN.

See SETTLEMENT, 3.

JUDGES' CERTIFICATE.

See PRACTICE, 32.

JURISDICTION.

See JUSTICES, 1, 2.

JUSTICES.

1. It is not necessary, in order to give the justices at sessions jurisdiction, to hear an appeal against overseers' accounts, that such accounts should previously have been examined and allowed pursuant to 50 G. 3. c. 49. *Re v. The Justices of Colchester, H. 2 and 3 G. 4.* 335

2. The proviso in 55 Geo. 3. c. 51. s. 1, stating that that act shall not give any jurisdiction to the justices of the county over any places situate within the limits of any liberties or franchises having a separate jurisdiction, is confined to franchises having a separate jurisdiction co-extensive with that possessed by the county justices; and, therefore, where the justices of the city of B. had no jurisdiction by charter to try felons, it was held that the

city of B. was liable to the county rate. *Re v. Colchester, E. 3 G. 4.* 335

3. An order of sessions for levying and paying to the treasurer of the county a sum to enable him to reimburse certain persons for an antecedent debt, although such debt had been incurred for county purposes, is bad. *Re v. The Justices of Flintshire, E. 3 G. 4.* 361

LANDLORD AND TENANT.

1. The growing crops of a tenant having been seized under a *fi. fa.*, a writ of *hab. fac. poss.* was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord, founded on a demise made long before the issuing of the *fi. fa.* Held, that the sheriff was not bound to sell the growing crops under the *fi. fa.*, inasmuch as they could not, in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration: Held, also, that the sheriff had no right to allow to the landlord a year's rent, under the statute of 8 Ann. c. 14., that statute contemplating an existing tenancy, which in this case must be taken to have ceased on the day of the demise in the ejectment. *Hodgson v. Gascoigne, M. 2 G. 4.* 88

2. A landlord has no right to distrain, unless there be an actual demise to the tenant at a fixed rent; and, therefore, where a tenant was in possession, under a memorandum of agreement to let on lease, with a purchasing clause, for 21 years, at the net clear rent of 69*l.*, the tenant to enter any time on or before a particular day: Held, that this only amounted to an agreement for a future lease, and that no lease having been executed, and no rent subsequently

requently paid, the landlord was not entitled to distrain. *Dunk v. Hunter*, H. 2 and S. G. 4. Page 322

A covenant by a lessee, that he will sufficiently muck and manure the land with two sufficient sets of muck within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenant's laying on two sets of muck within the three last years of the term. *Pownall v. Moores*, H. 2 and S. G. 4. 416

Where, by a local act, it was provided that a drainage tax should be paid by the tenants of the lands and grounds charged with the same, who might deduct and retain the same out of the rents payable to their landlord. And also, that in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear, and if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a surety for the payment thereof, and might be taken possession of, and let in discharge of the tax: Held, that the tenants to be charged with the tax, were those in whose time the tax accrued due, and not the tenants on the time being. And, therefore, where an outgoing tenant having paid his rent in full, had left property on the premises, which was afterwards distrained for the tax due during his tenancy, and he was obliged to pay it: Held, that he might recover the same in an action against his landlord for money paid. *Dawson v. Jenson*, H. 2 and S. G. 4. 521

Where a copyholder has been admitted to a tenement, and done fealty to the lord of a manor, he is

estopped in an action by the lord for a forfeiture, from shewing that the legal estate was not to the lord at the time of admittance. *Doe dem. Nepean v. Budden*, E. 3 G. 4. Page 626

6. A tenancy by virtue of an agreement in writing for three months certain, is a tenancy "for a term" within the meaning of the 1 G. 4. c. 87. *Doe dem. Phillips v. Roe*, E. 3 G. 4. 766

7. Where a tenant holds from year to year, but without a lease or agreement in writing, it is not a case within 1 G. 4. c. 87. s. 1. *Doe dem. Earl of Bradford v. Roe*, E. 3 G. 4. 770

8. Where certain mill-machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill, and it was afterwards seized under a fi. fa. by the sheriff, and sold by him: Held, that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the continuance of the term. *Farran v. Thompson*, T. 3 G. 4. 826

9. By lease granted in 1814, and to take effect from 1820, certain houses, together with a piece of ground which was part of an adjoining yard, were leased to a tenant, together with all ways with the said premises or any part thereof used or enjoyed before. At the time of granting the lease, the whole of the yard was in the occupation of one person, who had always used and enjoyed a certain right of way to every part of that yard: Held, that the lessee was entitled to such right of way to the part of the yard demised to him. *Kooystra v. Lucas*, T. 3 G. 4. 830

10. Where premises had been de-

granted by two tenants in common, and the rent for a time paid to the jointest of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and the rent was so paid accordingly, and separate receipts given: Held, that it then became a question of fact for a jury to say, whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of rent to each. *Powis v. Smith*, T. 3 G. 4. Page 850

11. Two messuages were conveyed unto such uses as A. should appoint, and in default of appointment to A. for life, and after the determination of that estate in his lifetime to B. for the life of A., in trust for A. and his assigns; with remainder to A. in fee. A. leased both these messuages to a tenant at an apartment of 65l. 10s. for a term of years, and during the continuance of that term, contracted to sell the reversion of one of the messuages to C. In the contract either messuage was described on lease, together with another, and that the apportioned rent in respect of it was 40l. A. and B. afterwards conveyed the reversion of both houses, and the entire rent of 65l. 10s. unto C. to certain uses, viz. as to the said messuage which A. had contracted to sell, and the yearly rent of 40l., together with all powers and remedies reserved for recovering the rent of 65l. 10s. unto such uses as A. should appoint; and as to the other messuage and the residue of the entire rent, to the use of A. in fee. A. afterwards appointed the messuage which he had contracted to sell, and the apportioned rent to the use of B. Held, that the latter did not acquire the same rights and remedies against the lessee as he would have acquired if the rent

had been legally apportioned by a jury, the lessee for the term not being bound by an apportionment made without his consent. *Bliss v. Collins*, T. 3 G. 4. Page 876

LEASE.

1. Where there were two assignments of the same lease of premises within the county of Middlesex, and that executed last was registered first: Held, that the deed last registered, must in a court of law be considered as fraudulent and void, in consequence of 7 Ann. c. 20. s. 1, although the party claiming under the second assignment had full knowledge, when it was executed, of the prior execution of the first assignment. *Dorlem. Robinson v. Allsep*, M. 2 G. 4. Page 142
2. By a private act passed in the year 1720, certain estates were settled in strict settlement, and a power was reserved to the respective tenants in tail, by deed, to lease any part of the lands thereby settled, "for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon every such lease there be reserved, and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services for the same; and, so as there be contained therein, a condition of re-entry for non-payment of the said rent, and rents thereby to be reserved." By lease, dated the 6th January, 1785, a tenant in tail of the said estates demise a part of the premises thereby, settled to hold from the date of the lease for ninety-nine years, if three persons therein named should so long live, yielding and paying yearly and every

for the landlord was not thereby deprived of the benefit of the act, 2. c. 28., and consequently was entitled by that statute to enter without making any demand:

Held, also, that part of the premises formerly demised jointly with others at one entire rent, might be let under the terms of this power at a rent bearing the same proportion to the old rent, that the premises demised by the lease bore to the whole premises formerly demised: *Doe dem. Earl of Shrewsbury v. Wilson*, H. 2 and 3 G. 4. Page 363

3. A covenant by a lessee that he will sufficiently muck and manure the land with two sufficient sets of muck within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenants laying on two sets of muck within the three last years of the term. *Pownall v. Moores*, H. 2 and 3 G. 4. 416

LIBEL.

1. The Court will grant a criminal information for a libel upon a public body of men, upon an affidavit, stating the publication of the libel by the defendant. *Har v. Williams*, E. 3 G. 4. 595

2. Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of a third person speaking of the plaintiff's conduct, and the declaration in setting it out had omitted those references: Held, that these omissions altered the sense of the remainder; and that the variance was fatal. *Carter v. Wright*, E. 3 G. 4. 615

3. A petition addressed by a creditor of an officer in the army to the secretary at war, bona fide and with

a view of obtaining, through his interference, the payment of a debt due; and containing a statement of facts, which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable. In such an action, even upon the general issue, evidence may be received to shew that the writer bona fide believed the facts stated in the petition to be true. *Fairman v. Pitt*, E. 3 G. 4. Page 612

LIEN.

1. The owner of goods being indebted to a factor in an amount exceeding their value, assigned them to him for sale; the factor, who being similarly indebted to A. & S., sold the goods to him. The factor afterwards became bankrupt; and, on a settlement of accounts between I. S. and the assignees, A. & S. allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate of the factor. Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees, afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner. *Hudson v. Granger*, 11 Q. B. 27

2. A foreign merchant, purchased in his own name, but on account and with the money of B, a British merchant, certain bank shares in the French funds. The latter drew bills upon A, which he accepted, on the security of those shares standing in his name; and these bills were assigned by B to C, a British subject. Before they became due B authorized A, by letter,

ter, to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived A. had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; B. also afterwards became bankrupt; C., by process in the foreign country, attached the bank shares still standing in the name of A. for the debts due to him upon the bills; and the Court there decreed that the bank shares should be sold, and that the proceeds should be applied, first to pay a debt due from B. to A., and afterwards to retire the bills. Under this decree C. received a certain sum of money on account of the bills: Held, that the assignees of A. could not recover back this money as belonging to B. *Cazenove and Another, Assignees of Power and Warwick, Bankrupts, v. Prevost*, M. 2 G. 4.

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3. A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners. Goods having been sent by the carrier, addressed in the order of J. S. a mere factor: Held, that the carrier had not, as against the real owner, any lien for the balance due from J. S. 4. Quere, whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from J. S. *Wright v. Snell*, H. 2 and 3 G. 4.

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LIMITATIONS, STATUTE OF.

2. In an action by an administrator upon a bill of exchange, payable

to the testator, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing. *Murray, Administrator v. The East India Company*, M. 2 G. 4.

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2. Where on a plea of *actio non accrevit infra seu annos*, it appeared that a writ of testatum special capias was issued, within six years in Michaelmas term, and an alias testatum capias in Easter term following, but no writ in Hilary term: Held, that this was sufficient to take the case out of the statute, the suit being actually, although irregularly, commenced within six years, and that the continuances in Hilary term might be supplied at any time. *Beardmore v. Rattenbury*, H. 2 and 3 G. 4.

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3. In order to save the statute of limitations, it is sufficient that the writ be sued out, and the return thereon indorsed upon it in time. It is not necessary that the writ should be delivered out of the sheriff's office as returned. *Taylor and Another, Assignees, v. Hopkins*, H. 2 and 3 G. 4.

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4. Where premises were mortgaged in fee, with a proviso for reconveyance, if the principal and interest were paid on a given day, and in the mean time that the mortgagor should continue in possession, upon special verdict it was found, that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury, either that interest had or had not been paid by the mortgagor: Held, that upon this finding, it must be taken, that the occupation was by the permission of the mortgagee and,

con-

1002 LORDS' ACT.

consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations: Held, that an entry is not necessary to avoid a fine levied by the mortgagee: *Hall v. Dowdell*, *Sartoris* (in error), *E. 3 G. 4.* Page 687

LORDS' ACT.

See PARTNERSHIP, 2.

1. When a defendant is in execution for a particular debt, under 900*l.*, although the aggregate of the debts for which he is in execution exceeds that sum, he is liable, at the instance of the particular creditor, to be brought up under the compulsory clause in the lord's act, 33 G. 3. c. 5. *Chappell v. Ashley*, *H. 2 and 3 G. 4.* 557

2. The notices required by 32 G. 2. c. 28. s. 16., need not be personally served on the detaining creditors. Where the service was sworn to be on the attorney of a creditor residing abroad, it was held sufficient, although the affidavit did not state that he was the attorney last employed in the suit under which the insolvent was detained, the objection being taken by the insolvent, and not on the part of the creditor. *Chappell v. Ashley*, *E. 3 G. 4.* 749

3. A married woman who, with her husband, is in execution for a debt contracted by her before coverture, is not entitled to be discharged under the insolvent act; she not being capable of executing a warrant of attorney, and complying with the other terms required by the 1 G. 4. c. 119. s. 23: *Ex parte Deacon*, *E. 3 G. 4.* 759

MORTGAGOR, &c.

MANDAMUS.

See PRACTICE, 21. 44.

MARRIED WOMAN.

See PRACTICE, 23. 26. LORDS' ACT, 3.

MARRIAGE SETTLEMENT.

See DEVISE, 4. FINE, 1.

MEMORIAL.

See ANNUITY, 2. 3.

MILITIA MAN.

See SETTLEMENT, 1.

MINES.

See POOR RATE, 1.

MONEY HAD AND RECEIVED.

See PLEADING, 11.

MORTGAGOR AND MORTGAGEE.

1. A mortgagor in possession of the premises mortgaged, is tenant to the mortgagee. *Partridge v. Bere*, *E. 3 G. 4.* Page 604
2. Where premises were mortgaged in fee, with a proviso for reconveyance, if the principal and interest were paid on a given day, and in the mean time, that the mortgagor should continue in possession; upon special verdict, it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury either that interest had or had not been paid by the mortgagor: Held, that upon this finding, it must be taken, that the occupation was by the

NOTICE OF ACTION.

the permission of the mortgagee, and consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations: Held, also, that an entry is not necessary to avoid a fine levied by the mortgagor. *Hall v. Doe dem. Surtees and Another, in error*, E. 3 G. 4. Page 687

NEW TRIAL.

See PRACTICE, 28.

NON-USER.

See COURT, 1.

NOTICE OF ACTION.

By a local act relating to the commissioners of sewers for *Westminster*, it was provided that no plaintiff should recover in any action brought for any thing done in pursuance of the general acts for sewers, or that act, unless notice in writing was given to the defendants, specifying the cause of such action. A notice stated that the defendants, who were contractors under the commissioners, made, altered, &c. certain sewers, &c. running under, through, or adjoining, or near to the plaintiff's house, in so negligent, incautious, unskillful, improvident, and improper a manner, that it fell down; and by the declaration and proof given, it appeared that the sewer did not run close to the plaintiff's house, but close to five other houses adjoining thereto, and that the house was damaged, and fell in consequence of the fall of a stack of chimneys of one of those houses, which had been built on the arch of the sewer, and which had been insufficiently shored up by the defendants during the con-

PARTNERSHIP. 1803.

tinuance of the work: Held, that this notice sufficiently described the cause of action: Held also, that commissioners of sewers, and persons working by their order, in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such proper precautions for securing them, and to shore them up if necessary, as skilful persons would do, and that they were bound, under the above circumstances, to give specific notice to the owner of the house to which the stack of chimneys belonged, of their construction, and of the danger arising therefrom, and that a general notice to him to take proper means to secure his house was not sufficient. *Jones v. Bird*, T. 3 G. 4. Page 837

OUTLAWRY.

See PLEADING, 25.

PACKETS.

See HARBOUR DUES, 1.

PARTNERSHIP.

1. Where an infant held himself out as in partnership with J. S., and continued to act as such till within a short period of his coming of age, but there was no proof of his doing any act as a partner after twenty-one: Held, that it was his duty to notify his disaffirmance of the partnership on arriving at twenty-one; and, as he had neglected to do so, that he was responsible to persons who had trusted J. S. with goods, subsequently to the infant's attaining twenty-one on the credit of the partnership. *Goode v. Harrison*, M. 2 G. 4. 147
2. By a deed of dissolution of partnership a power was reserved to the remaining partners to use the name

name of the retiring partner in the prosecution of all suits. In an action in which judgment had been obtained by all the partners before the dissolution, it was held that the remaining partners had authority, under that power, to give to the defendant a note for the payment of the six-pences under the Lords' act on behalf of themselves and the retiring partner. *Burton and Others v. Issitt, M. 2 G. 4.* Page 267

3. By deed, A. and B. covenanted to become partners in the business of army clothiers, for ten years, and that A. should advance 20,000*l.* as part of the capital for carrying on the business, and that B. should find a like sum; that A., during the continuance of the partnership, should have out of the profits, if sufficient, or, if not, out of the capital, 2000*l.* yearly for his share of the profits. B. then covenanted that, on the determination of the partnership by effusion of time, the sum of 20,000*l.* should be repaid to A.; that B. should guarantee all debts and pay all losses. In an action brought upon this deed to recover the 20,000*l.* at the expiration of the ten years, the defendant pleaded, that the deed was executed by way of shift, in pursuance of an usurious agreement. That plea, upon issue joined, was negatived by the verdict of the jury, and judgment was given by the Court of C. P. for the plaintiffs: Held, upon error in K. B., that after that finding the deed must be taken to disclose the real intention of the parties, and that it was not, therefore, void upon the ground of usury. *Gulpin v. Enderby, T. 3 G. 4.* 954

PAWNBROKER.

A pawnbroker is a broker within

the 5 G. 2, c. 30. s. 39, and, therefore, subject to the bankrupt laws.

A person who had formerly taken in goods upon pledge, but had ceased to do so, still continuing to sell the unredeemed pledges, thereby carries on the trade of a pawnbroker, and is subject to the bankrupt laws. *Rawlinson v. Pearson, M. 2 G. 4.* Page 124

2. A pawnbroker has no right to sell unredeemed pledges after the expiration of a year from the time the goods were pledged, if the original owner tender him the principal and interest due. *Walter v. Smith, H. 2 and 3 G. 4.* 339

PENAL ACTION.

1. In order to constitute the offence of keeping a setting dog within the 5 and 6 Anne, c. 14. s. 1, the dog must be kept for the purpose of killing and destroying game; and, therefore, where it appeared that at the time when the alleged offence was charged to have been committed, the dog was tied up, and never went out into the field with its master, this was held not to be an offence within the statute. *Hagood v. Robinson, H. 2 and 3 G. 4.* 517
2. J. S., being the master of the workhouse, appointed by and receiving orders from the guardians of the poor of the parish of W., bought provisions from Z. B., one of such guardians: Held, that Z. B. was liable to the penalty of 100*l.* imposed by the 33 G. 3, c. 131. s. 6. *West v. Anderson, H. 2 and 3 G. 4.* 528

PERIL OF THE SEA.

See Insurance, 2, 3.

PERJURY.

See CRIMINAL INFORMATION, 3.

PERPETUITY.

PERPETUITY.

SEE DEVISE 8.

PEW.

SEE ACTION ON THE CASE 10.

PILOT.

SEE SHIP OWNER 10.

PLEADINGS.

A., B. and C., entered into a bond to the king, the condition of which was, that *A.*, as sub-distributor of stamps, should well and truly account for all stamped vellum which he should receive; and should pay to the commissioners the duties payable for such stamped vellum, and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage coaches. *A.*, as sub-distributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. A sci. fa. having afterwards issued upon the bond, *B.*, one of the sureties, paid a sum of money to compromise the suit, and a certain other sum, in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt, that *A.* was a person "surety for, or liable for a debt, of the bankrupt, within the meaning of the 49 G. 3. c. 121. s. 8. and consequently, that the latter was protected by his certificate: Held, also, that the general plea of bankruptcy was well pleaded. *Westcott & Hodges*, M. 2 G. 4. Page 12.

2. Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c.; and then averred, that plaintiff did assign the bill. It appeared that the parties had agreed that the

plaintiff should give up the bill to the defendant; the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff, by deed, assigned to the defendant the bill, and all sums of money due thereon, to and for the defendant's own use; and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill: Held, that the declaration imported that the plaintiff had made an absolute assignment of the bill, and, consequently, that the assignment in evidence being only conditional, this was a fatal variance. *Tansand v. Burt*, M. 2 G. 4. Page 12.

3. Assumpsit, in consideration that the plaintiff, for the accommodation and at the request of the defendant, would accept certain bills of exchange, and would deliver them so accepted to the defendant, in order that he might negotiate the same for his own benefit, defendant undertook to provide money for the payment of the said bills as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof. Breach, that the defendant did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof the plaintiff, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses: Held, upon demurrer, that as plaintiff might be entitled, upon this declaration, to recover special damage, a set-off was not a good plea. *Hardcastle v. Neitherwood*, M. 2 G. 4. 93.

4. Declaration upon four bills of exchange. Plea in bar, that defendant was indebted to plaintiff, in divers large bills of money, for goods sold, and that for securing

to the plaintiff the said several sums of money, defendant, before his bankruptcy, accepted a bill of exchange, drawn by the plaintiff, for and in payment of one of the said several sums of money in which he was so indebted as aforesaid; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums of money in which he so stood indebted as aforesaid. The plea then stated, that defendant had duly become bankrupt, and that the bills of exchange mentioned in the declaration were proveable under the commission; and that the plaintiffs, being creditors for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission, and thereby made their election to take the benefit of the commission, not only with respect to the debt so proved; but also as to the bills and debts mentioned in the declaration: Held, upon demurrer, that this plea could not be supported first, because the proof of a debt under the commission of bankruptcy cannot be pleaded in bar to an action at law brought for the same debt; secondly, that the election of the creditor to take the benefit of the commission is confined by the 10 G. 3. c. 121. s. 14. to the debt actually proved; and does not extend to distinct debts ejusdem generis due at the same time. *Hutley and Another v. Greenwood*, M. 2 G. 4. Page 95.

8. The giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and, therefore, where a ship, having on board a pilot required by law, ran foul of

another vessel, and proceedings were instituted by the owners of the latter, to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained agreed, on the owners of the damaged vessel renouncing all claims on the other vessel; and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damage: Held, that there being contradictory decisions as to the point, whether ship owners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel, to pay the stipulated damages.

Longridge and Others v. Doroille and Another, M. 2 G. 4. Page 117.

6. Where in an action on a policy of insurance on ship in the usual form, for twelve months, at sea and in port, the loss averred was as follows; (that the ship having arrived at the harbour of St. J., and discharged her cargo, it became necessary to place her; and she was accordingly placed, in a graving dock, there to be repaired, and near to a certain wharf in the graving dock; and that whilst she was there, by the violence of the wind and weather, she was driven over on her side, whereby she struck the ground with great violence, and was brigsed &c. &c.) Held, that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes, &c." for which the underwriters were liable: Held, also, that the above facts, with the additional circumstance of there being two or three feet water in the graving

grazing dock when the accident happened, did not amount to a loss by perils of the sea. *Phillips v. Barber*, M. 2 G. 4. Page 116

7. The condition of a bond, after reciting that defendant and J. S. had delivered and indorsed to the plaintiff a bill of exchange, drawn by J. S. and accepted by A. B., was, that defendant and J. S., or either of them, their heirs, &c. should pay or cause to be paid, to the plaintiff, his executors, &c. the sum secured by the bill, within one month after it should become due and payable, in case it should not be then paid by the acceptor, to the plaintiff, his executors, &c. according to the tenor of the said bill, together with interest from the time the bill became due: Held, that to an action on this bond, it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and J. S., or either of them. *Murray v. King*, M. 2 G. 4.

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8. It is not any defence at law to an action on a bond against a surety, that by a parol agreement time has been given to the principal. *Davey and Others, v. Prendergrass*, M. 2 G. 4.

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9. Assumpsit will lie upon a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognized by statute.

In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing.

An agent having money in his hands belonging to his principal, purchases with it a bill of exchange, which he indorses specially to his principal; the latter, at the time of the indorsement, was dead, but that fact was not known to the agent: Held, that the property in the bill passed to the administrator of the principal, and that he might therefore sue upon the bill in that character: Held, also, that the administrator was only entitled to recover interest upon bills accepted after the death of the testator, from the time of demand of payment made by the administrator, and not from the time the bills became due.

Where the declaration stated the drawing of certain bills of exchange, and their acceptance after the death of the intestate, the granting of the letters of administration to the plaintiff, the defendant's liability, &c.; and the defendant pleaded that the cause of action did not accrue within six years, to which the plaintiff replied generally, that it did accrue within six years: It was held, that the replication was good. *Murray, v. The East India Company*, M. 2 G. 4.

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10. In trespass, the first count of the declaration stated, that the defendant assaulted and imprisoned plaintiff; and, during such imprisonment, struck, pulled, and pushed him about. Justification, that defendant arrested plaintiff under process of court; and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c.: Held, that this latter part of the justification not being proved, the plaintiff was entitled to judgment; and that it was not necessary to aver, assign the battery by the defendant:

Held,

- Held, also, the second count of the declaration (which omitted the battery) having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses, as laid in the first count. *Phillips v. Homgate*, M. 2 G. 4. Page 220
11. Where the plaintiffs were creditors and defendants debtors to T. and Co., and, by consent of all parties, an arrangement was made that defendants should pay to plaintiffs the debt due from them to T. and Co.: Held, that as the demand of T. and Co. on defendants was for money had and received, the plaintiffs were entitled to recover, on a count for money had and received, against the defendants. *Wilson v. Coupland*, M. 2 G. 4. 228
12. The condition of a bond, after reciting that A. B. and C. had filed a bill in equity against E. and D., was, that the obligor should pay all such costs as the Court of Chancery should award to the defendants on the hearing of the cause: Held, by three justices (*Abbott C. J.* dubitante) that the death of E., before any costs awarded, could not be pleaded in discharge of the bond. *Kipling v. Turner*. M. 2 G. 4. 261
13. In order to constitute the offence of keeping a setting dog, within the 5 and 6 Anne, c. 14. s. 4., the dog must be kept for the purpose of killing and destroying game; and, therefore, where it appeared that, at the time when the alleged offence was charged to have been committed, the dog was tied up, and never went out into the field with its master; this was held not to be an offence within the statute. *Hayward v. Horner*, H. 2 and 3 G. 4. 317
14. J. S. being the master of the workhouse, appointed by, and receiving orders from the guardians of the poor of the parish of W., bought provisions from A. B., one of such guardians: Held, that A. B. was liable to the penalty of 100*l.*, imposed by the 55 G. 3. c. 137. s. 6. *West v. Andrews*, H. 2 G. 4. Page 328
15. A printer cannot recover for labour or materials used in printing any work, unless he affixes his name to it, pursuant to the 39 G. 3. c. 79. s. 27. *Bensley v. Bignold*, H. 2 and 3 G. 4. 335
16. An action at common law will not lie for disturbing another in the possession of a pew, unless the pew be annexed to a house in the parish. *Mainwaring v. Giles*, H. 2 and 3 G. 4. 356
17. Where judgment of nonsuit had been given in an action brought against an infant, it is no ground of error that the infant had appeared by attorney, *Bird v. Pegg*, H. 2 and 3 G. 4. 418
18. Declaration stated that defendant covenanted to obey, abide by, and perform an award, and that he would not prevent the arbitrators from making their award. It then stated that the arbitrators made their award, and thereby directed the defendant to pay a certain sum therein mentioned; and alleged as a breach of the covenant, that the defendant did not pay the sum awarded. Plea, that before the award, defendant, by deed, revoked the authority of the arbitrators, of which revocation they had notice: Held, upon demurrer, that defendant was entitled to judgment, although it appeared by the plea, that he had been guilty of a breach of the covenant to abide by the award by revoking the authority of the arbitrators, the plaintiff being entitled to recover

cover damages only in respect of the cause of action stated in his declaration, and not in respect of a cause of action disclosed in the plea.

The second count of the declaration stated the deed of reference, and then averred that defendant did, before the making of the award, hinder and prevent the arbitrators from making their award in this; that the defendant, by a certain deed in writing, signed and sealed by him, after reciting, as is therein recited, did revoke the authority: Held, upon demurrer that this was an allegation, not of the mere legal effect of the deed, but of the fact of revocation, and, that it was unnecessary to state that the arbitrators had notice of the revocation, that being necessarily implied in the averment, that the defendant had revoked the authority. *Marsh v. Bulleel*, H. 2 and 3 G. 4.

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19. The contractors for making a navigable canal, having with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrongdoer. *Dyson and Another v. Collick*, E. 3 G. 4. 600

20. Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of a third person, speaking of the plaintiff's conduct, and the declaration in setting it out had omitted those references: Held, that these omissions altered the sense of the remainder, and that the variance was fatal. *Cartwright v. Wright*, E. 3 G. 4. 615

21. To an action on bill of exchange, the defendant pleaded non-assumpsit to all but a part, and as to that

part, a tender. Replication, that after the cause of action accrued, and before the tender, the plaintiff demanded the sum tendered: Held, that this issue would only be supported by proof of the demand of the precise sum tendered. *Rivers v. Griffiths*, E. 3 G. 4. Page 630

22. An action lies for the malicious prosecution of a bad indictment for perjury: Held, also, that a count stating that defendant had maliciously indicted plaintiff for wilful and corrupt perjury, is good after verdict, although the count did not set out any indictment. *Phipps v. Hearn*, E. 3 G. 4. 634

23. A petition addressed by a creditor of an officer in the army to the secretary at war, bona fide and with a view of obtaining, through his interference, the payment of a debt due; and containing a statement of facts, which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable. In such an action, even upon the general issue, evidence may be received to shew that the writer bona fide believed the facts stated in the petition to be true. *Fairman v. Ives*, E. 3 G. 4. 642

24. A count stating that defendant had and received to the use of the plaintiff a certain sum of money, to be paid by the defendant to the plaintiff upon request; and the non-payment upon request, and that the defendant converted and disposed thereof to his own use, is bad upon demurrer. *Orton v. Butler*, E. 3 G. 4. 652

25. In an original writ the defendant was described as *T. B.*, of *C.* in the county of *N.*; upon a writ of error, brought to reverse the outlawry; the error assigned was, that *T. B.* was not, before or at the

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time

- time of the original writ, of or conversant in *C.* aforesaid, and that there was not any town, hamlet, or place of the name of *C.* in that county. Plea to this assignment of errors, that plaintiff prosecuted his writ with intent to declare upon a bond made by the defendant, by which he was described as *T. B.* of *C.* in the county of *N.*: Held, that this was an estoppel. *Bonner v. Wilkinson*, *E. 3 G. 4.* Page 682
26. *A.* covenanted that he would, from time to time, at the request of *B.*, avow and confirm all actions that *B.* should bring in respect of a bond, of which *A.* was the obligee, without releasing the same. Declaration stated, that *B.* commenced an action in the name of *A.*, against the obligor of the bond, and that *A.* did not, although often requested so to do, avow and justify the said action, but, on the contrary thereof, executed a release to the obligor of all actions, bonds, &c., by reason whereof the plaintiff was hindered from recovering the principal and interest, his costs, and other expenses: Upon special demurrer to this breach, it was held, first, that the averment of request was unnecessary, and that it therefore required no venue, inasmuch as it appeared that the defendant had, by executing the release, disabled himself from bringing any action upon the bond. Secondly, that it was no ground of demurrer to the whole breach, that the plaintiff was not entitled to recover the special damage. *Amory v. Broderick*, *E. 3 G. 4.* 712
27. Debt on a bond given to plaintiff, as treasurer of a friendly society. Plea, that the rules of the society had not been confirmed at the quarter sessions, pursuant to 33 G. 3. c. 54.: Held, upon demurrer, that the plea was bad, the bond being a good bond at common law. *Jones v. Woolam*, *E. 3 G. 4.* Page 769
28. A plaintiff paid into his own bankers a cheque of 250*l.* drawn upon them by a third person, which they received without any objection; and in the course of the same day the drawer of the cheque paid in a sum of money, part of which he particularly appropriated, leaving a balance unappropriated of 237*l.* The bankers, who were then creditors of the drawers to a large amount, wrote on the next morning to the plaintiff stating, that the cheque was not paid, but that they would keep it in the hope of there being money to pay it; and on that day a further unappropriated balance was paid in, making altogether a sum exceeding the plaintiff's cheque: Held, that under these circumstances, the plaintiff might maintain money had and received against the bankers, and that the latter, being his agents for receipt of the money, could not appropriate the balance to the payment either of their own general account against the drawer, or of two cheques presented on the same day, but subsequently to that of the plaintiff, and paid by them. *Kilsby v. Williams, T. and Others*, *3 G. 4.* 815
29. Declaration for tithes bargained and sold. Plea, that before the exhibiting of the plaintiff's bill, the defendant paid to the plaintiff a sum of money, parcel, &c. in discharge and satisfaction of the promises in the declaration mentioned, and that plaintiff accepted the same in satisfaction and discharge of the promises. Replication, that before the exhibiting of the bill, the plaintiff had sued out a latitat, and that the defendant did not, before the plaintiff sued

sued out that writ, pay the plaintiff the said sum of money in manner and form as the defendant had alleged. Upon demurrer, it was held that the plea was bad, because it did not allege the payment to have been in discharge of the *costs and damages* accrued by reason of the non-performance of the promises. *Francis v. Crywell, T. 3 G. 4.* Page 886

PLEDGE.

A. and B. having agreed to purchase cottons on their joint account, directed their brokers to purchase the same. These purchases having been made, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession as the brokers of A. Immediately after the purchase, B. paid A. one half of the value. After considerable purchases had been made, the brokers were informed that B. had an interest in the goods purchased; A. after this, directed the brokers to procure him a loan on the security of the warrants, and C. advanced money by discounting bills drawn by A. upon the brokers, as a security for which, the whole of the warrants were deposited with C. by the brokers. While they were so deposited, the brokers received directions both from A. and B. to make a division of the goods held on their joint account, which they did by appropriating specific warrants to each party, and which division was approved of by both. Before the bills became due, the brokers were directed by A. to get one half renewed, which C. agreed to do, and discounted fresh bills, and the brokers then left in the hands of C., as a security for the

money thus advanced, the warrants belonging to B.; C., however, not then knowing that B. had any interest in them:

Held, first, that the first pledge did not transfer to C. any interest in that part of the goods which belonged to B. Semble, that a sale by one of two tenants in common of the whole property, is a conversion as to the share of one, and consequently that trover is maintainable:

Held, secondly, that after the partition had taken place, the tenancy in common, if it ever had existed, was determined, and that being so, the second pledge was a pledge of a specific chattel belonging to B. which the brokers had no authority to make, and that trover was maintainable. *Barton v. Williams, H. 2 and 3 G. 4.* Page 395

POOR.

*I. S. being the master of the work-house, appointed by, and receiving orders from, the guardians of the poor of the parish of W., bought provisions from A. B. one of such guardians: Held, that A. B. was liable to the penalty of 100*l.* imposed by the 55 G. 3. c. 137. s. 6.* *West v. Andrews, H. 2 and 3 G. 4.* 328

POOR RATE.

Where the owner of the soil, by indenture, granted to certain adventurers full and free liberty to dig, mine, and search for tin, tin ore, &c., and the same to take and convert to their own use, subject to a reservation therein contained, and to make such adits, shafts, &c. as they should think necessary, yielding and paying to him one full eighth share of all such tin, tin ore, &c., the same having been

first spalled, picked, or otherwise made merchantable, and fit to be smelted. And the indenture contained a power either for payment in ore, or the amount thereof in money, which had been acted upon; and the owner had received it in money: Held, that for this, his one-eighth share, he was liable to be rated as an occupier of land, the reservation operating as an exception out of the demise, and not being of the nature of a rent. *Rez v. The Inhabitants of St. Austell*, E. 3 G. 4. Page 693

POWER OF APPOINTMENT.

Certain lands were conveyed to A. B., his heirs and assigns, to such uses as C. D. should by deed appoint; and in default of, and until appointment, to the use of C. D. in fee. C. D. afterwards, in execution of the power, by deed duly made an appointment of the said estates in favour of E. F. in fee. C. D. at the time of making the appointment, was married. His wife was held not to be dowable out of these lands. *Ray v. Pung*, E. 3 G. 4. 561

POWER OF ATTORNEY.

See PRINCIPAL AND AGENT, 2.

Where a power of attorney was given to fifteen persons, jointly or severally therein named, to execute such policies as they or any of them should jointly or severally think proper: Held, that an execution of such power by four of the persons named was sufficient. *Guthrie v. Armstrong*, E. 3 G. 4. 628

POWER OF LEASING.

See LEASE, 2.

PRACTICE.

See NOTICE OF ACTION.

1. A submission to arbitration, under 9 and 10 W. 3. c. 15. s. 1, may be made a rule of court in vacation. *In the Matter of Taylor*, M. 2 G. 4. Page 217
2. Where a plaintiff in error trades out of the jurisdiction of the court, he may be compelled to give security for costs; and in default thereof, the defendant in error will be permitted to proceed on his judgment notwithstanding the writ of error. *Lewis and Others v. Owens*, M. 2 G. 4. 265
3. A tipstaff is entitled to take a fee of 6s. and no more, for conducting a prisoner from the Judge's Chambers to the King's Bench. *In the Matter of Salisbury*, M. 2 G. 4. 266
4. Where on a plea of *actio non accrevit infra sex annos*, it appeared that a writ of testatum special capias was issued within six years in *Michaelmas* term, and an alias testatum capias in *Easter* term following, but no writ in *Hilary* term: Held, that this was sufficient to take the case out of the statute; the suit being actually, although irregularly, commenced within six years, and that the continuance in *Hilary* term might be supplied at any time. *Beardmore v. Rattenbury*, H. 2 and 3 G. 4. 452
5. In order to save the statute of limitations, it is sufficient that the writ be sued out, and the return thereon indorsed upon it in time. It is not necessary that the writ should be delivered out of the sheriff's office as returned. *Taylor v. Hipkins*, H. 2 and 3 G. 4. 489
6. Where, in the account between plaintiff

plaintiff and defendant, there are items clearly due on both sides, it is an arrest without reasonable and probable cause within 43 G. 3. c. 46. s. 3., if the plaintiff arrests and holds the defendant to bail for the amount due to him without, at the same time, giving him credit for the items clearly due on the other side of the account. He ought only to hold the defendant to bail for the admitted balance. *Dronefield v. Archer*, H. 2 and 3 G. 4. Page 513

7. Where a rule has been obtained for staying the proceedings in ejectment till the costs of a former ejectment have been paid, the Court will not interfere, and permit the defendant in case those costs are not paid before a certain day to be named by the Court, to non pros the ejectment pending. *Doe dem. Sutton v. Ridgway*, H. 2 and 3 G. 4. 523

8. Where, in a case in which a corporation were defendants, the response is withdrawn in consequence of the absence of a material witness who is one of the corporation, and it does not appear that such absence arises from the act of, or is in collusion with the other corporations, the prosecutor will be compelled to pay the costs of not proceeding to trial pursuant to notice. *Rex v. The Mayor, &c. of Great Yarmouth*, H. 2 and 3 G. 4. 531

9. Where an attorney, knowing that bail are insufficient, puts them in, and gives notice of justification, he will be personally liable to pay the costs of the opposition. *Blundell v. Blundell*, H. 2 and 3 G. 4. 533

10. A certificate to deprive a plaintiff of costs, may be indorsed on the postea after costs have been taxed, and although the defend-

ant's attorney was present, and did not object to such taxation. *Farrell v. Banks*, H. 2 and 3 G. 4. Page 536

11. When a defendant is in execution for a particular debt under 300*l.*, although the aggregate of the debts for which he is in execution exceeds that sum, he is liable at the instance of the particular creditor to be brought up under the compulsory clause in the lords' act, 33 G. 3. c. 5. *Chappell v. Ashley*, H. 2 and 3 G. 4. 537

12. A clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the crown: Held, that he could not, within 22 G. 2. c. 46. s. 8 & 10., be considered as serving his whole time and term in the proper business of an attorney, and that he ought not to be admitted on the roll, and that having been admitted, he ought to be struck off. *Ex parte Taylor; Gent. one, &c.* H. 2 and 3 G. 4. 538

13. In trespass the Court will, upon a proper case being made for it, require the plaintiff's attorney to give to the defendants information as to the place of abode and occupation of the plaintiff. And where the alleged assault was stated to have taken place, at a meeting at which many thousand people were present, and the defendants did not know, and could not find out, after diligent enquiry, who the plaintiff was, the Court thought it a proper case for their requiring such information to be given. *Johnson v. Birley*, H. 2 and 3 G. 4. 540

14. Where the facts tending to criminate a magistrate, took place twelve months before the application to the Court, they refused to grant a criminal information, although the prosecutor, in order

to excuse the delay, stated that the facts had not come to his knowledge till very shortly previous to the application. *Rex v. Bishop*, E. 3 G. 4. Page 612

15. An attorney brought his action for his bill of costs, and held the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing: Held, that this was a case within the 43 G. 3. c. 46. s. 3., and that, if not within the statute, still the Court in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances. *Robinson v. Elsam*, E. 3 G. 4. 661

16. A motion for security for costs, on the ground of the plaintiff's residence abroad, cannot be made if the defendant has taken any step in the cause subsequently to his becoming acquainted with the fact of the plaintiff's being resident abroad, and therefore, the affidavit in support of the motion, if made after plea, must expressly state that defendant was not acquainted with it when he pleaded. *Duncan v. Stint*, E. 3 G. 4. 702

17. On motion for setting aside proceedings on the bail bond, bail above having justified the affidavit, must state that the defendant has a good defence upon the merits. *Grottick v. Bailey*, E. 3 G. 4. 703

18. Where bail are rejected on account of the insufficiency of one, the bail piece becomes a nullity, and therefore, the notice should be for putting in and justifying bail, and not of adding bail. *Lewis v. Gadderer*, E. 3 G. 4. 704

19. Defendant being taken up on the 8th of June upon an indictment for a libel, entered into a recognizance to appear and plead

within the first eight days of *Trinity* term, and to try the cause at the sittings after that term. The defendant pleaded not guilty, but did not give notices of trial, or make up the record either for the sittings after *Trinity* or *Michaelmas* term, nor were the recognizances respited. The prosecutors gave notice of trial after *Trinity* and *Michaelmas* term, but the causes were not tried. The defendant was ready and willing to take his trial on both these occasions. The recognizances were estreated in *Hilary* term without any notice to the defendant, or any motion by the prosecutor: Held, that this estreat was regular. *Rex v. Clark*, E. 3 G. 4. Page 728

20. The Court will grant a *habeas corpus* to the warden of the Fleet, to take the body of a debtor confined there, before a magistrate to be examined from time to time respecting a charge of felony or misdemeanour. *Ex parte Griffith v. Griffiths*, E. 3 G. 4. 730

21. Where a return to a *mandamus* to restore a party to a corporate office is defective in form, but, on the whole, it appears that there is good ground for a motion, the Court will not award a peremptory *mandamus*; the only effect of which would be to compel the corporation to restore an officer whom they would be bound immediately to remove in a more formal manner. *Rex v. Edmund Griffiths*, E. 3 G. 4. 731

22. Attachment irregular, being obtained after summons to attend before a judge for payment of debt and costs, the plaintiff's attorney not having attended at the time. *Rex v. Sheriff of Middlesex in Woodward v. Feltham*, E. 3 G. 4. 746

23. On an application to discharge a defendant

defendant out of custody, on the ground that she was a married woman, it is necessary that that fact should be positively stated in the affidavit. And, therefore, where it was sworn that she was a married woman, as by certificate annexed will appear, it was held insufficient. *Harvey v. Cooke*, E. 3 G. 4.

Page 747

24. Where a plea is so framed as that it may reasonably induce the plaintiff to consult counsel in order to know how to deal with it, the Court will, on affidavit that such a plea is wholly false, permit the plaintiff to sign judgment as for want of a plea. *Shadwell v. Berthoud*, E. 3 G. 4.

750

25. It is not a valid objection on shewing cause, that a rule to compute was moved on the day of signing interlocutory judgment for not bringing in the record. *Rus- sen v. Hayward*, E. 3 G. 4.

752

26. A married woman, who, with her husband, is in execution for a debt contracted by her before coverture, is not entitled to be discharged under the insolvent act; she not being capable of executing a warrant of attorney, and complying with the other terms required by the 1 G. 4. c. 119. s. 25. *Ex parte Deacon*, E. 3 G. 4.

759

27. In trespass against custom-house officers for taking plaintiff's goods, which had been returned in a deteriorated state before action brought, a verdict was found for plaintiff, for the difference in price between the value of the goods at the time of the seizure, and the time when they were returned. The judge certified that there was probable cause for the seizure: Held, that the plaintiff was not precluded by the 28 G. 3. c. 37. s. 24. from taking out execution for the damages found by the

jury. *Laugher v. Brefitt*, E. 3 G. 4.

Page 762

28. Where a new trial is ordered, the costs to abide the event, such event means the ultimate event of the cause, and therefore, if the verdict on the second trial be set aside, and on a third trial, the ultimate event is the same as at the first trial, the party will be entitled to the costs of the first trial. *Meule v. Goddard*, E. 3 G. 4.

766

29. A tenancy by virtue of an agreement in writing for three months certain, is a tenancy "for a term" within the meaning of the 1 G. 4. c. 87.

Upon a rule, calling upon the tenant to enter into a recognizance under that statute, it is unnecessary to express in the rule nisi the amount of the security required. *Doe dem. Phillips v. Roe*, E. 3 G. 4.

766

30. An information in the nature of a quo warranto may be granted at common law, within the 9 Anne, c. 20., against a party for exercising the office of a bailiff in the borough of M. although it was not a corporate office. Quære, whether in such a case the defendant may plead several matters. *Rex v. Highmore*, E. 3 G. 4.

771

31. The 17 G. 3. c. 56. s. 22. takes away the writ of certiorari only from offences for the first time, created by 22 G. 2. c. 27. and does not apply to those created by 12 G. 1. c. 34., and extended to the silk and cotton trades by 22 G. 2. c. 27. *Rex v. Rogers*, E. 3 G. 4.

773

32. A judge's certificate under 43 Eliz. c. 6. is sufficient to deprive a plaintiff of costs, notwithstanding the action be brought under 11 G. 2. c. 19. s. 19., by which, in case the plaintiff obtains a verdict, he is entitled

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titled

- ...titled to full costs. *Irvine v. Reddish*, E. 3 G. 4. Page 796
33. The 19 G. 3. c. 70. s. 4. is confined to those suits in inferior courts where the proceedings are similar to those in the superior courts, and, therefore, does not extend to the case of a foreign attachment. *Bulmer v. Marshall*, T. 3 G. 4. 821
34. Where a bailiff had written to an attorney for writs, which the latter sent without knowing any thing of the parties or circumstances, but the bailiff never represented himself or had been considered as an attorney, nor looked for any profit upon the law proceedings: Held, that this was not a case within the 22 G. 2. c. 46. s. 11.: but that it was a most improper practice, which the Court, in virtue of its general jurisdiction over attorneys, would punish severely. *Ex parte Wharton*, T. 5 G. 4. 824
35. A bond was conditioned for the resignation of a living, which the defendant, when requested, had refused to resign: Held, that he being a wrong doer, the jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff by the defendant's life-interest, nor in estimating the annual proceeds to deduct the curate's stipend. *Lord Sondes v. Fletcher*, T. 3 G. 4. 835
36. A bill against an attorney was filed of Michaelmas term, and appeared by the memorandum to have been filed on the 28th of November: Held, that evidence was admissible to shew that it was actually filed on the 24th December: Held, also, that a demand and refusal is evidence of a prior conversion; and, therefore, where deeds were in defendant's possession prior to Michaelmas term, and the demand and refusal proved were on the day after that term, it was held that this was evidence of a conversion before the term. *Willon v. Girdlestone*, T. 3 G. 4. Page 847
37. The notice to the tenant in possession at the foot of the declaration in ejectment, need not be in the name of the plaintiff; but, if in the name of the lessor of the plaintiff, or even any other person, the Court will permit the rule for judgment against the casual ejector to be drawn up. *Goodtitle dem. Duke of Norfolk v. Nostle*, T. 3 G. 4. 849
38. Where a surety in a warrant of attorney, in order to discharge himself from his personal liability, paid part of the debt due to the creditor of a bankrupt, who had proved under the commission, and thereupon satisfaction was entered on the record: Held, that this did not fall within the 49 G. 3. c. 121. s. 8. as being a payment of part of a debt in discharge of the whole, and that consequently the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him. *Soutten v. Soutten*, T. 3 G. 4. 852
39. In debt for use and occupation after judgment by default. Semble that a writ of enquiry is necessary before signing final judgment. *Arden v. Connell*, T. 3 G. 4. 885
40. Where a plaintiff had issued one writ against three defendants for separate causes of action, and after delivering three separate declarations de bene esse, entered one common appearance according to the statute for all the three defendants, and signed three interlocutory judgments as for want of plea: Held, that this was irregular. *Cor v. Bucknell*, T. 3 G. 4. 892
41. Where a plaintiff had been nonsuited at nisi prius on the ground of

of a trifling variance between the contract set out, and that proved, the Court granted a new trial with leave to amend the declaration, generally on payment of costs, with liberty to the defendant to plead de novo or demur. *Williams v. Pratt*, T. 3 G. 4. Page 896

42. Charges for holding the courts leet of a manor by the steward, are charges for business connected with his professional character of an attorney; and, therefore, are like conveyancing charges, taxable when found in a bill containing other taxable items. *Luzmore, Gent., one. &c. v. Lethbridge*, one, &c. T. 3 G. 4. 898

43. The Court will not grant a mandamus to a private trading corporation to permit a transfer of stock to be made in their books. *Rex v. The London Assurance Company*, T. 3 G. 4. 899

44. Where a lord of a manor is indicted for a nuisance in not repairing the bank of a river, the Court will not compel him to allow the prosecutor, even though he is a tenant of the manor, to inspect the court rolls for the purpose of obtaining evidence in support of the prosecution. *Rex v. The Earl of Cadogan*, T. 3 G. 4. 902

45. No motion can be made to stay the proceedings in an action on a judgment pending a writ of error until bail have been put in and perfected. *Abraham v. Pugh*, T. 3 G. 4. 903

46. Where a plaintiff, shortly previous to making an affidavit of debt, had written a letter, stating that the defendant was a creditor of his, the Court interfered in a summary way to discharge the defendant out of custody, on affidavits denying the debt, the plaintiff not having denied the writing of such

letter by him, or alleged that the debt due to him had arisen subsequently to it. *Nisettich v. Bonnick*, T. 3 G. 4. Page 904

47. Where a defendant, being previously in custody in execution for a debt, a detainer was lodged against him, but for too large a sum, and on this being discovered in a few hours, the plaintiff discontinued on payment of costs, and before the payment of costs lodged a fresh detainer: Held, that this second detainer was regular, and that it was not like the case of a fresh arrest, which cannot be made till the costs have been paid. *White v. Gompertz*, T. 3 G. 4. 905

48. Where a cause stood in the paper below the last cause mentioned in the written list affixed at the outside of the court, and was tried, (being stated to be an undefended cause,) the counsel for the defendant objecting to it, and declining to appear: Held, that the trial was regular, and the Court refused a new trial, there being no affidavit of merits. *Blackhurst v. Bulmer*, T. 3 G. 4. 907

49. Where a plaintiff carried on business abroad, and had no permanent residence in England, but was in England at the time of bringing the action, and it was sworn, had no intention of leaving the country: Held, that this was no sufficient answer to an application for security for costs, inasmuch as it was not distinctly sworn that he resided and intended to continue to reside here: Held, also, that it is no answer to such application, that the action is brought in pursuance of liberty reserved by the Vice-Chancellor, it not being brought by his direction. *Oliva v. Johnson*, T. 3 G. 4. 908

PRINCIPAL AND AGENT.

1. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale: the factor being also similarly indebted to *I. S.*, sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between *I. S.* and the assignees, *I. S.* allowed credit to them for the price of the goods, and proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.

By 47 G. 3. sess. 2. c. 28. s. 29., "All contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market." A factor having coals consigned to him for sale by *A.*, sold the same, and entered the contract in his book as having been made for *C.*, the master of the ship. It was not signed by the purchaser; but in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted: the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. Query, whether, under the circumstances, an action might be brought in the name of *C.* for the

price of the coals. *Hudson v. Granger*, M. 2 G. 4. Page 27

2. A power of attorney authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all monies, debts, dues, whatsoever, and to give sufficient discharges, does not authorize him to indorse bills for his principal. An agent having money in his hands belonging to his principal, purchases with it a bill of exchange, which he indorses specially to his principal; the latter, at the time of the indorsement, was dead, but that fact was not known to the agent: Held, that the property in the bill passed to the administrator of the principal, and that he might, therefore, sue upon the bill in that character. *Murray v. The East India Company*, M. 2 G. 4. 204

3. *A.* and *B.* having agreed to purchase cottons on their joint account, directed their brokers to purchase the same. These purchases having been made, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession as the brokers of *A.* Immediately after the purchase *B.* paid *A.* one half the value. After considerable purchases had been made, the brokers were informed that *B.* had an interest in the goods purchased; *A.*, after this, directed the brokers to procure him a loan on the security of the warrants, and *C.* advanced money by discounting bills drawn by *A.* upon the brokers, as a security for which the whole of the warrants were deposited with *C.* by the brokers. While they were so deposited, the brokers received directions, both from *A.* and *B.*, to make a division of the goods held on their joint account, which they did

PRINTER.

- did by appropriating specific warrants to each party, and which division was approved of by both. Before the bills became due, the brokers were directed by *A.* to get one-half renewed; which *C.* agreed to do, and discounted fresh bills, and the brokers then left in the hands of *C.*, as a security for the money thus advanced, the warrants belonging to *B.*; *C.*, however, not then knowing that *B.* had any interest in them: Held, first, that the first pledge did not transfer to *C.* any interest in that part of the goods which belonged to *B.* Semble that a sale by one of two tenants in common of the whole property is a conversion as to the share of one, and, consequently, that trover is maintainable: Held, secondly, that after the partition had taken place, the tenancy in common, if it ever had existed, was determined, and that being so, the second pledge was the pledge of a specific chattel belonging to *B.*, which the brokers had no authority to make; and that trover was maintainable. *Barton v. Williams*, *H. 2 G. 4.* Page 395
4. *A.*, a merchant in *London*, had been in the habit of selling goods to *B.*, resident in the country, and of delivering them to a wharfinger in *London*, to be forwarded to *B.* by the first ship. In pursuance of a parol order from *B.* goods were delivered to and accepted by the wharfinger, to be forwarded in the usual manner: Held, that this not being an acceptance by the buyer, was not sufficient to take the case out of the 29 *Car. 2. c. 3. s. 17.* *Hanson v. Armitage*, *H. 2 and 3 G. 4.* 557

PRINTER.

See PLEADING, 15.

RESIGNATION BOND. 1019

PROMOTIONS, 438.

QUO WARRANTO.

See PRACTICE, 8.

1. Where, in an application for a quo warranto against a constable, the affidavits in support of the rule stated, that for fifty years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial: Held, that it was not sufficient. *Rex v. Lane*, *H. 2 and 3 G. 4.* Page 488
2. An information in the notice of a quo warranto may be granted at common law, within the 9 *Anne*, c. 20., against a party, for exercising the office of a bailiff in the borough of *M.*, although it was not a corporate office. Quære, whether in such a case, the defendant may plead several matters. *Rex v. Highmore*, *E. 3 G. 4.* 771

RATE.

See INCLOSURE ACT, 2. JUSTICES, 3.

RECOGNIZANCE.

See PRACTICE, 19.

REGISTER ACT.

See DEED, 1.

RENT.

See POOR RATE, 1. LANDLORD AND TENANT, 11.

RESIGNATION BOND.

See ADVOWSON.

RELEASE.

RELEASE.

A deed, containing a general release of all debts, &c., recited that the releasee had previously agreed to pay to the releasor the sum of 40*l.*, for the possession of certain premises, and that, "in consideration of the said sum of 40*l.* being now so paid as hereinbefore is mentioned," and also in consideration of the sum of 10*s.* a-piece, well and truly paid to the said releasor and J. S., the receipt of which said several sums of money they did thereby acknowledge, release, &c. There was also a receipt for the sum of 40*l.* indorsed on the release. But it appeared on an action afterwards brought for this sum, that in fact it had never been paid: Held, that this deed of release was no estoppel, inasmuch as the general words of release were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the sum of 40*l.* *Lampon v. Corke*, E. 3 G. 4. Page 606

REMOVAL, ORDER OF.

1. An order of removal was dated 1st August, 1814, and an order of suspension indorsed thereon, in consequence of the sickness of the pauper; and a copy of such order and indorsement was, in 1814, served upon the appellants, but the original order not produced at the time of serving such copy; and subsequently, in 1815, another part of the order and indorsement executed by the same justices, but bearing date in August, 1814, was served upon the appellants. The pauper was not removed till 1819, when an appeal was duly entered: Held, that the

services of the original order of removal, in 1814 and 1815, were both defective, and that the appeal was made in time, notwithstanding 49 G. 3. c. 124. s. 2. *Rex v. Inhabitants of Alwicks*, M. 2 G. 4. Page 184

2. Where an order of removal has been executed, and by consent of the removing parish and the magistrates making it, it is superseded, and the paupers taken back, it is in the discretion of the sessions to enter an appeal against it or not, according as they may think that justice requires it, in order to compel the respondents to pay the costs of maintenance, &c. incurred by the appellants before the order was superseded. *Rex v. The Justices of Norfolk*, H. 2 and 3 G. 4. Page 184

SEA.

The public have no common law right of bathing in the sea; and as incident thereto of crossing the sea-shore on foot, or with bathing machines for that purpose. *Blundell v. Catterall*, M. 2 G. 4. 268

SETTLEMENT

1. A pauper, being eighteen years of age, and residing with his father, was drawn, as a militia man, and served for five years as an enlisted man. During his service, he several times, when on furlough, and, finally, after his discharge from the militia, returned to his father's house: Held, that by his so remaining separated from his father's family after twenty-one, he was emancipated, although the original separation was not voluntary on his part. *Rex v. The Inhabitants of Hardwick*, M. 3 G. 4. 176

2. During

2. During the minority of a child, there can be no emancipation unless he marries, and so becomes himself the head of a family, or contracts some other relation, so as wholly and permanently to exclude the parental controul. Semble, that the acquiring a settlement of his own does not properly constitute an emancipation. *Rex v. The Inhabitants of Wilmington, H. 2 and 3 G. 4.* Page 525

9. Where the unemancipated daughter of an Irishman, not having acquired any settlement of his own in England, became pregnant, being unmarried, and as such was actually chargeable under 35 G. 3. c. 101. s. 6.: Held, that this did not make her father and the rest of his family removable by a pass to Ireland under 59 G. 3. c. 12. s. 33.; but that the daughter might be removed by an order to the place of her birth in England. *Rex v. The Inhabitants of Whitehaven, E. 3 G. 4.* 720

4. Where a district, previously extra-parochial, was, by act of parliament, made a township, and it was provided that from thenceforth it should maintain its own poor, and repair its own roads, and have the like powers, privileges, and immunities, and be subject to the same regulations, as other townships within the county: Held, that this clause was prospective only, and that a bastard born within the district previously to passing the act, was not settled there. *Rex v. The Inhabitants of Oakmere, E. 3 G. 4.* 775

SETTLEMENT BY APPRENTICESHIP.

1. An indenture of apprenticeship, executed before the passing of the 44 G. 3. c. 98.; must be stamped with the premium stamp within the

time prescribed by the statute 8 Anne, c. 9., and where such an indenture was stamped at the time of its being produced in evidence, with the stamp required by the 55 G. 3. c. 184., but not within the time prescribed by the statute of Anne: Held, that the indenture was wholly void, and that the pauper, by serving under it, gained no settlement. *Rex v. The Inhabitants of Chip-ping Norton, H. 2 and 3 G. 4.* Page 412

2. Where a parish apprentice was assigned by his original master to I. S., by an instrument in writing, but there was no consent of two magistrates: Held, that this was not a lawful assignment, under 32 G. 3. c. 57. s. 7., but it was sufficient to shew the consent of the first master to the service to I. S., and consequently, such service was good as a service under the original indenture, and conferred a settlement. *Rex v. The Inhabitants of Barlestone, E. 3 G. 4.* 780

SET-OFF.

Assumpsit in consideration that the plaintiff, for the accommodation, and at the request of the defendant, would accept certain bills of exchange, and would deliver them, so accepted to the defendant, in order that he might negotiate the same for his own benefit, defendant undertook to provide money for the payment of the said bills, as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof. Breach, that defendant did not provide money for the Bills, nor indemnify the plaintiff from damage, by reason whereof the plaintiff, as acceptor, was forced and obliged to pay to the holders of

of the bills certain sums of money, with interest, charges and expences: Held, upon demurrer, that, as plaintiff might be entitled upon this declaration to recover special damage, a set-off was not a good plea. *Hardcastle v. Netherwood*, M. G. 4. Page 93

SEWERS, COMMISSIONERS OF.

By a local act relating to the commissioners of sewers for *Westminster*, it was provided that no plaintiff should recover in any action brought for any thing done in pursuance of the general acts for sewers, or that act, unless notice in writing was given to the defendants, specifying the cause of such action. A notice stated that the defendants, who were contractors under the commissioners, made, altered, &c. certain sewers, &c. running under, through, or adjoining, or near to the plaintiff's house, in so negligent, incautious, unskilful, improvident, and improper a manner, that it fell down; and by the declaration and proof given, it appeared that the sewer did not run close to the plaintiff's house, but close to five other houses adjoining thereon, and that the house was damaged, and fell in consequence of the fall of a stack of chimneys of one of those houses, which had been built on the arch of the sewer, and which had been insufficiently shored up by the defendants during the continuance of the work: Held, that this notice sufficiently described the cause of action: Held, also, that commissioners of sewers, and persons working by their order, in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such

proper precautions for securing them, and to shore them up if necessary, as skilful persons would do, and that they were bound, under the above circumstances, to give specific notice to the owner of the house to which the stack of chimneys belonged, of their construction, and of the danger arising therefrom, and that a general notice to him to take proper means to secure his house was not sufficient. *Jones v. Bird*, T. 3 G. 4. Page 637

SHERIFF.

1. The growing crops of a tenant having been seized under a fi. fa., a writ of hab. fac. poss. was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord, founded on a demise made long before the issuing of fi. fa.: Held, that the sheriff was not bound to sell the growing crops under the fi. fa., inasmuch as they could not, in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of demise laid in the declaration: Held, also, that the sheriff had no right to allow to the landlord a year's rent, under the stat. of 8 Ann. c. 14. that statute contemplating an existing tenancy, which, in this case, must be taken to have ceased on the day of the demise in the ejectment. *Hodgson and Others, Assignees of Seaton v. Gascoigne*, M. 2 G. 4. 88
2. A sheriff has no right under a fi. fa. to seize fixtures, where the house in which they are situated is the freehold of the person against whom the execution issues. *Winn v. Ingilby*, E. 3 G. 4. 625

SHIP.

1. A transfer of a ship, while at sea, to

to a vendee resident in the port in which the ship is registered, is not valid, unless copies of the bills of sale are delivered to the custom-house officers in that port within a reasonable time after the sale.

Richardson and Others, Assignees of Wyler and Another v. Campbell, M. 2 G. 4. Page 196

2. The captain of a ship has no authority to sell the cargo, except in cases of absolute necessity; and, therefore, where, in the course of a voyage from *India*, the ship was wrecked off the *Cape of Good Hope*, and some indigo, which was part of the cargo, was saved, and the same was there sold by public auction, by the authority of the captain, acting *bonâ fide* according to the best of his judgment for the benefit of all persons concerned; but the jury found that there was no absolute necessity for the sale: Held, that the purchaser at such sale acquired no title, and the indigo having been sent to this country, the original owners were held entitled to recover its value. *Freeman v. The East India Company, E. 3 G. 4.* 617

3. *A.*, a ship-builder, contracted with *B.* to build a ship for *B.*, and complete her in *April*, 1819. The latter was to pay for her by four instalments; the first when the keel was laid, the second when they were at the light plank, and the third and fourth when the ship was launched. Before the 25th *June*, 1819, the ship was measured, with the builder's privity, to the intent that *B.* might get her registered in his name. On the 25th the ship-builder signed the usual certificate of her building, and on the 26th the ship was registered in *B.*'s name, and on that day the third instalment was paid. On the 30th *June* *A.* committed an act of bank-

ruptcy, upon which a commission afterwards issued. On the 2d of *July*, the ship not being then completed or launched, *B.* and a crew hired by him took possession of the ship and a rudder and cordage, the former of which was made by the ship-builder, and the latter bought by him for the express purpose of completing the ship: Held, first, that the legal effect of the ship-builder's having signed the certificate to enable *B.* to have the ship registered in his name, was to vest the general ownership in *B.* from the time the registry was completed: Held, secondly, that as the rudder and cordage were made and bought by the ship-builder specifically for the ship, they were to be considered as parts of the ship; and that the property in them also vested in *B.*: Held, thirdly, that although the general property in the ship was vested in *B.*, yet, as *A.* had not parted with the possession, and as he would have had a lien upon the ship for the amount of the fourth instalment, if he had completed it; that the taking possession of the ship by *B.*, without tendering the amount of the fourth instalment, or so much thereof as was due, provided any thing was due, was wrongful, and, consequently, that the assignees of *A.* were entitled to recover from *B.* the amount of the fourth instalment, provided the expense necessary for the completion of the ship did not amount to that sum, or so much thereof as would remain due after defraying such expense. *Woods and Another, Assignees of Paten, a Bankrupt v. Russell, T. 3 G. 4.* Page 942

SHIP OWNER.

The giving up of a suit instituted to try

try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and, therefore, where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter, to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages: Held, that, there being contradictory decisions as to the point whether ship owners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages. *Longridge and Others v. Dorville*, M. 2 G. 4.

Page 117

SMUGGLER.

A smuggler may be a trader within 1 Jac. 1. c. 15. s. 2. as being a person who seeks his trade of living by buying and selling, although such buying and selling be illegal. A penalty due to the crown is a debt within 21 Jac. 1. c. 19. s. 2., and, therefore, where a trader lay in prison above two months, being unable to pay exchequer penalties for smuggling: Held, that it was an act of bankruptcy. *Cobb, Assignee of Monsey*,

16

STAMP.

v. *Symmonds*, H. 2 and 3 G. 4.
Page 516

SPIRITUOUS LIQUORS.

A plaintiff, in an action for a tavern bill, is not entitled to recover for any items under 20s. for spirits supplied to the guests, such sales being prohibited by 24 G. 2. c. 40. s. 16. *Burnyeat v. Hutchinson*, M. 2 G. 4. 241

STAMP.

1. An indenture of apprenticeship, executed before the passing of the 44 G. 3. c. 98. must be stamped with the premium stamp within the time prescribed by the statute 8 Anne, c. 9., and where such an indenture was stamped at the time of its being produced in evidence, with the stamp required by the 55 G. 3. c. 184. but not within the time prescribed by the statute of Anne: Held, that the indenture was wholly void, and that the pauper, by serving under it, gained no settlement. *Rex v. The Inhabitants of Chipping Norton*, H. 2 and 3 G. 4. 412
2. Three persons joined as drawer, acceptor, and first indorser in making an accommodation bill, and it was afterwards issued for value to J. S. Previously to its being so issued, its date had been altered: Held, that the acceptor having assented to the alteration when he was informed of it, it was no answer to an action on the bill against him, that the bill had been so altered without the consent of the drawer and first indorser, and that a fresh stamp was not necessary in consequence of such alteration, the bill having been altered before it was issued in point of law. *Downes v. Richardson*, E. 3 G. 4. 674

STATUTE,

STATUTE, CONSTRUCTION OF.

See APOTHECARIES.

STOPPAGE IN TRANSITU.

See VENDOR AND VENDEE, 8.

SURETY.

See BANKRUPT, 11.

1. *A. B. and C.* entered into a bond to the king, the condition of which was; that *A.*, as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage-coaches. *A.*, as subdistributor, becomes indebted to the king in a certain sum, and afterwards, becomes bankrupt and obtains his certificate. *A. sci. fa.* having afterwards issued upon the bond; *B.*, one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt that *A.* was a person "surety for, or liable for, a debt" of the bankrupt within the meaning of the 49 G. 3. c. 121. s. 8., and consequently, that the latter was protected by his certificate: Held, also, that the general plea of bankruptcy was well pleaded. *Westcott v. Hodges*, M. 2 G. 4. Page 12
2. It is not any defence at law to an action on a bond against a surety, that by a parol agreement, time has been given to the principal. *Davey and Others v. Pendergrass*, M. 2 G. 4. 187

Vol. V.

SURNAME.

See FORFEITURE, 1.

TENANT IN COMMON.

See LANDLORD AND TENANT, 10.
PRINCIPAL AND AGENT, 3.

TIPSTAFF.

See PRACTICE, 8.

TITHE.

1. *A.* having purchased an estate free from rectorial tithe, with a right of common thereto annexed; the common was afterwards inclosed under an act of parliament, and certain land was allotted to *A.* in lieu of his said right of common: Held, that no tithe was payable in respect of the allotted land. *Steel v. Manns*, M. 2 G. 4. Page 22
2. By an inclosure act it was enacted, that the commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed unto the impropriate rectors and curate, in lieu of all great and vicarial tithes; and the commissioners were required to distinguish by their award, the several allotments to the impropriate rectors and curate respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes: Held, under this act, that the tithes were not extinguished until the commissioners made their award. *Ellis v. Arnison*, M. 2 G. 4. 47

TONNAGE DUTY.

See HARBOUR DUES, 1.

TOWNSHIP.

See CONSTABLE, 1.

3 X

TRES-

TRESPASS.

See PRACTICE, 28.

The contractors for making a navigable canal having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrong doer. *Dyson v. Collick*, E. S. G. 4. Page 600

TROVER.

See PRINCIPAL AND AGENT, 3.

1. Where goods, the property of the plaintiff, had been, by the servant of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them, refused to do so without an order from the company: Held, that this was not such a refusal as amounted to a conversion of the goods by the defendant. *Alexander v. Southey*, M. S. G. 4. 247

2. Where certain mill-machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill, and it was afterwards removed under a f. fa. by the sheriff and sold by him: Held, that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the continuance of the term. *Ross v. Thompson*, E. S. G. 4. 826

3. A bill against an attorney was filed at Michaelmas term, and appeared by the memorandum to

have been filed on the 20th November: Held, that evidence was admissible to shew that it was actually filed on the 24th December: Held, also, that a demand and refusal is evidence of a prior conversion, and therefore, where deeds were in defendant's possession prior to Michaelmas term, and the demand and refusal proved were on the day after that term, it was held that this was evidence of a conversion before the term. *Wilde v. Girdlestone*, T. S. G. 4. Page 847

UNDER-SHERIFF.

See EVIDENCE, 5.

USE AND OCCUPATION.

See PRACTICE, 89.

USURY.

See PARTNERSHIP, 3.

An inclosure act empowered the commissioners to make a rate to defray the expences of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners. Expences were incurred in the execution of the act before any rate was made. To defray these expences the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts: Held, that the commissioners were personally responsible to

VARIANCE.

to the bankers, for the drafts so made.

The latter having from time to time made half-yearly rests in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging interest half-yearly was not unlawful on the ground of usury. *Eaton v. Bell*, M. & G. 4. Page 34

VARIANCE.

1. Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c.; and then averred that plaintiff did assign the bill. It appeared that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff by deed assigned to the defendant the bill, and all sums of money due thereon, to and for the defendant's own use; and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill. Held, that the declaration imported that the plaintiff had made an absolute assignment of the bill, and consequently, that the assignment in evidence being only conditional, this was a fatal variance. *Vassenden v. Burr*, M. & G. 4.

2. Where a libellous paragraph as proved contained two references, by which it appeared to be in fact the language of a third person speaking of the plaintiff's conduct, and the declaration in setting it out had omitted those references. Held, that these omissions altered the sense of the remainder, and

VENDOR AND VENDEE. 1027

that the variance was fatal. *Cartwright Esq. v. Wright*, E. & G. 4. Page 615

VENDOR AND VENDEE.

1. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor being also similarly indebted to J. S., sold the goods to him. The factor afterwards became bankrupt, and on a settlement of accounts between J. S. and the assignees, J. S. allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate. Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.

By 47 G. 3. c. 29, s. 29, "all contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market. A factor having coals consigned to him for sale by 4, sold the same, and entered the contract in his book, and having been made for C, the master of the ship. It was not signed by the purchaser; but in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted; the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. Quere, whether under the

- circumstances, an action might be brought in the name of *C.* for the price of the coals. *Hudson v. Granger*, *M. 2 G. 4.* Page 27
2. *A.*, a spirit merchant, sold to *B.* a wine merchant, several casks of brandy, some of which at the time of the sale were not known to be, and others in bottles of a regular warehouse keeper. It was agreed between the parties that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided, that this sale had taken place; but no notice of such sale had been given to the warehouse keeper with whom some of the casks were deposited. *A.*, having become bankrupt while the brandies remained where they were originally deposited, it was held that the whole of them passed to his assignees, as goods in his possession, order and disposition by the consent and permission of the true owner, within the 21 *Jac. 1. c. 19. s. 11.* *Knowles v. Horsfall*, *M. 2 G. 4.* (184)
3. A transfer of a ship, while at sea, to a vendee resident in the port in which the ship is registered, is not valid, unless copies of the bills of sale are delivered to the custom-house officers in that port, within a reasonable time after the sale. *Richardson v. Campbell*, *M. 2 G. 4.* (186)
4. Where an advertisement for the sale of a ship, described her as "a copper-fastened vessel," adding, that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened; Held,

- that notwithstanding the words, "with all faults, &c." the vendor was liable for the breach of the warranty. *Shepherd v. Kinn*, *M. 2 G. 4.* Page 240
5. By a public act, the *Waterloo Bridge Company* were authorized to raise money for the purpose of completing their undertaking, either among themselves or by the admission of new members, or by granting annuities for term of years or for life. The act did not contain any provision that the annuities should, or should not be redeemable. The Company, however, in the original grant, reserved to themselves a power of redemption: Held, under these circumstances, that an auctioneer putting up to sale one of these annuities, was bound in his particulars of sale to describe it as a redeemable annuity. *Cowley v. Beards*, *M. 2 G. 4.* (1857)
6. *A.*, a merchant in *London*, had been in the habit of selling goods to *B.*, resident in the country, and of delivering them to a wharfinger in *London*, to be forwarded to *B.* by the first ship. In pursuance of a parol order from *B.*, goods were delivered to, and accepted by the wharfinger to be forwarded in the usual manner; Held, that this not being an acceptance by the buyer, was not sufficient to take the case out of the 29 *Car. 2. c. 8. s. 17.* *Hanson v. Armitage*, *H. 2 and 3 G. 4.* (1857)
7. The captain of a ship has no authority to sell the cargo, except in cases of absolute necessity, and therefore, where, in the course of a voyage from *India*, the ship was wrecked off the *Coast of Good Hope*, and some indigo which was part of the cargo was saved, and the same was there sold by public auction, by the authority of the captain, acting bona fide according

According to the best of his judgment for the benefit of all persons concerned; but, the jury found that there was no absolute necessity for the sale; Held, that the purchaser at such sale acquired no title, and the indigo having been sent to this country, the original owners were held entitled to recover its value. *Freeman v. The East India Company*, E. 9 G. 4. Page 817

8. Where goods were sold, free on Board, and upon their shipment the agent of the vendors tendered to the mate, (the captain being absent) a receipt by which the goods were acknowledged to be shipped on account of the vendors, which the mate kept, but refused to sign, and on the following day signed bills of lading to the orders of the vendees. Held, that the transitus was not at an end, but that on the insolvency of the vendees, the vendors were entitled to stop the goods. *Stuck v. Hufsch*, E. 9 G. 4. 632

9. The vendor of a print, being a copy in part of another, by varying in some trifling respects from the main design, is liable to an action by the proprietor of the original; and that although the vendor did not know it to be a copy. *West v. Francis*, E. 3 G. 4. 737

10. A horse was sold by verbal contract, but no time was fixed for the payment of the price. The horse was to remain with the vendors for 20 days without any charge to the vendee. At the expiration of that time the horse was sent to grass, by the direction of the vendee, and by his desire entered as the horse of one of the vendors. Held, that there was no acceptance of the horse by the vendee within 29 *Car. 2. c. 5. s. 17*. *Carter v. Toussaint*, T. 3 G. 4. 885

WAREHOUSE KEEPER.

See VENDOR AND VENDEE.

WARRANT.

A warrant issued in pursuance of a writ de contumace capiendo stated that the defendant was attached for non-payment of costs in a writ of appeal and complaint of nuisance lately depending in the Archdeacon Court of Canterbury. Held, that this warrant was insufficient in not stating with certainty the nature of the cause, so as to show that it was one apparently within the jurisdiction of the Ecclesiastical Court. *See Rogers v. Rugges*, E. 9 G. 4. Page 791

WAX.

1. In trespass and justification under a public right of way, the locus in quo, which was not a thoroughfare, had been under lease from 1719 to 1818, but as far back as living memory could go, it had been used by the public, and lighted, paved, and watched under an act of parliament, in which it was enumerated as one of the streets in Westminster. After 1818, the plaintiff, who previously lived for 24 years in its neighbourhood, inclosed it; Held, that under these circumstances, the jury were well justified in finding that there was no public right of way, inasmuch as there could be no dedication to the public by the tenants for 99 years, nor by any one, except the owner of the fee. Quare, whether there can be a public highway which is not a thoroughfare. *Wood v. Peal*, H. 2 and 3 G. 4. 454

2. By lease granted in 1814, and to take effect in June, 1820, certain houses, together with a piece of ground which was part of an adjoining yard, were leased to a

tenant,

tenant, together with all ways with the said premises, on any part thereof, used or enjoyed before the time of granting the lease, the whole of the yard was in the occupation of some persons, who had always used and enjoyed, &c. contain right of way to every part of that yard: Held, that the lessee was entitled to such right of way to the part of the yard demised to him. *Koogetra v. Lucas*, 7 G. 4.

Page 830

WILL.

1. A testator having both real and personal estate, after giving several pecuniary legacies, bequeathed all the rest and residue of his estate and effects, whatsoever and where-soever, to trustees, their executors, administrators, and assigns, upon trust; that they should, out of such residue of the monies and effects that he should die possessed of, carry on, manage, and cultivate the farm then in his possession for the remainder of his term therein, for the joint advantage of certain of his sons and daughters therein named; and, at the expiration of the said term, upon further trust, to sell and dispose of such residue of his estate and effects, or such effects as should then be upon his said farm, and to divide the money arising therefrom among his said sons and daughters: Held, that the testator's real estate did not pass by this will. *Doe dem. Hurrell and Another v. Hurrell and Others*, M. 2 G. 4. 18

2. A testator, by his will, bequeathed the rents of one dwelling-house situate in A. to C. B. for his life; and from and after the decease of the said C. B., he bequeathed the same rents, together with the rents of all his other houses and lands, unto his nephews and niece therein mentioned, for their lives and the

life of the survivor; and after the decease of the survivor of them, he gave and devised all his houses and lands to trustees, with trust to sell the same, and to pay the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor; and then devised all the residue of his estate to E. B. J. Held, that upon the death of the testator, the nephews and niece took an immediate estate, for their lives and the life of the survivor, in the rent of all the houses and lands, except the house specifically bequeathed to C. B. for his life. *Doe dem. v. Ansdale v. Brauer*, M. 2 G. 4. Page 64

3. An estate in fee, upon the determination of a life estate, was devised to the wife of A. B.: A. B. was one of the attesting witnesses to the will. The testator died in 1779, and the wife of A. B. died in 1813, before the previous life estate was determined: Held, that A. B. was not a good attesting witness to this will. *Hatfield v. Thorp*, E. 9 G. 4. 589

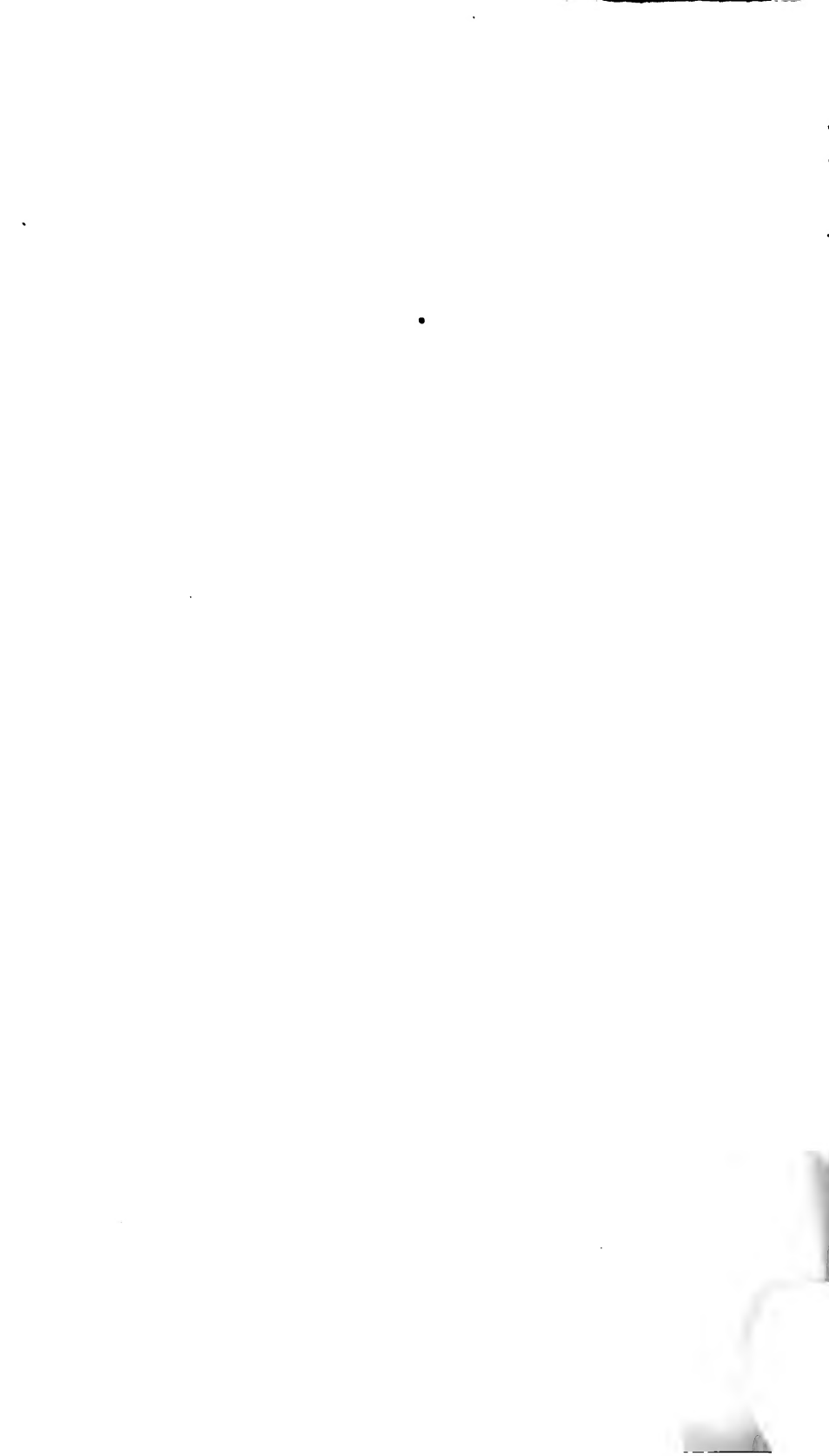
4. A., at the time of making his will, was seised in fee of certain freehold and leasehold premises, and, amongst the rest, of a dwelling-house, which he inhabited, in the parish of D.; and six acres of land, situate in the parish of S., a mile distant from the village of B.; and seventy acres of leasehold land, in and near the village of B.; and fifty-eight acres of freehold land, and some leasehold land in the parish of W. A., at the time of making his will, resided in the dwelling-house, and had in his own occupation all the land in the parish of W. A., and the freehold lands in the parish of S., and leasehold lands near the village of B.; but the freehold lands in the parish

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